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No. _____

In The
Supreme Court of the United States
October Term, 1994

JOSEPH M. MCDADE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the court of appeals err when it concluded that the Speech or Debate Clause did not mandate dismissal of the extortion, bribery and gratuity allegations in the indictment, even though proof of them would require proof of committee membership on legislative committees, participation in the committee process and the exercise of legislative oversight functions?

2. Did the court of appeals err in failing to find that legislative status, when used in an indictment against a Member of Congress as a proxy for legislative acts and motivations, is protected by the Speech or Debate Clause?

3. Did the court of appeals err when it concluded that the Speech or Debate Clause did not require specific pleading, or a bill of particulars, as well as supporting proof, subject to appellate review, to prevent Members of Congress from being questioned outside of Congress for their legislative acts and motivations?

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIPS

The named appellant in the court of appeals and the petitioner here is The Honorable Joseph M. McDade, United States Congressman for the Tenth Congressional District of Pennsylvania. The named appellee in the court of appeals and the respondent here is the United States of America. There are no corporate entities party to this proceeding.

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceeding and Designation of Corporate Relationships ii

Table of Authorities vi

Opinions Below 3

Statement of Jurisdiction 3

Constitutional Provision Involved 3

Statement of the Case 4

Reasons for Granting the Writ 6

I. AS PART OF ITS PURPOSE OF PROTECTING THE LEGISLATIVE PROCESS, THE SPEECH OR DEBATE CLAUSE PROTECTS THE COMMITTEE PROCESS, OVERSIGHT FUNCTIONS RELATED TO THE COMMITTEE PROCESS, AND COMMITTEE STATUS 7

A. The Committee Process and Legislative Oversight Are Core Legislative Activities Integral to the Legislative Process 8

1. The Indictment Charges Conduct Directly Protected by the Speech or Debate Clause . . . 14

TABLE OF CONTENTS - (*Continued*)

Page

2. The Indictment Forces Congressman McDade To Introduce Speech or Debate Protected Material in His Defense 17

B. The Court of Appeals Wrongly Held That the Use of Committee Status in the Indictment Did Not Violate the Speech or Debate Clause, Thereby Creating a Conflict Between Circuits .. 20

II. ONLY ADEQUATE PRETRIAL PROCEDURES CAN PROTECT A MEMBER'S RIGHT NOT TO BE QUESTIONED OUTSIDE CONGRESS CONCERNING LEGISLATIVE ACTIVITIES. 23

Conclusion 30

TABLE OF CONTENTS - (*Continued*)

Page

Appendix (Bound Separately)

Opinion of the United States Court of Appeals for the Third Circuit in *United States of America v. Joseph M. McDade*, dated June 15, 1994 . . . . . A-1

Opinion of the United States District Court for the Eastern District of Pennsylvania in *United States of America v. Joseph M. McDade*, dated May 6, 1993 . . . . . A-62

Order of the United States Court of Appeals for the Third Circuit in *United States of America v. Joseph M. McDade*, denying petition for rehearing and suggestion for rehearing in banc, dated August 9, 1994 . . . . . A-159

TABLE OF AUTHORITIES

Page

Cases

Abney v. United States, 431 U.S. 651 (1977) 24

Digital Equipment Corp. v. Desktop Direct, Inc., 114 S. Ct. 1992 (1994) 28

Dombrowski v. Eastland, 387 U.S. 82 (1967) 7, 17, 23

Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) 1, 6, 8, 9

Grady v. Corbin, 495 U.S. 508 (1990), *overruled on other grounds by United States v. Dixon*, 113 S. Ct. 2849 (1993) 25, 26

Gravel v. United States, 408 U.S. 606 (1972) . . . . . *passim*

Helstoski v. Meanor, 442 U.S. 500 (1979) 2, 7, 24

Hutchinson v. Proxmire, 443 U.S. 111 (1979) 1, 25

Kilbourn v. Thompson, 103 U.S. 168 (1880) 6, 27

McGrain v. Daugherty, 273 U.S. 135 (1927) 10

TABLE OF AUTHORITIES - (*Continued*)

Page

National Organization for Women, Inc. v. Scheidler, 114 S. Ct. 798 (1994) 24

Powell v. McCormick, 395 U.S. 486 (1969) 17

Sinclair v. United States, 279 U.S. 263 (1929) 10

Tenney v. Brandhove, 341 U.S. 367 (1951) 29

United States v. Bendis, 681 F.2d 561 (9th Cir.), *cert denied*, 459 U.S. 973 (1982) 25

United States v. Booth, 673 F.2d 27 (1st Cir.), *cert denied*, 456 U.S. 978 (1982) 25

United States v. Brewster, 408 U.S. 501 (1972) 12, 25

United States v. Castro, 629 F.2d 456 (7th Cir. 1980) 26

United States v. Inmon, 568 F.2d 326 (3d Cir. 1977) 25, 27

United States v. Jabara, 644 F.2d 574 (6th Cir. 1980) 25

TABLE OF AUTHORITIES - (*Continued*)

Page

United States v. Johnson, 383 U.S. 169 (1966) 12, 13

United States v. Loyd, 743 F.2d 1555 (11th Cir. 1984) 25

United States v. Mallah, 503 F.2d 971 (2d Cir.), *cert. denied*, 420 U.S. 995 (1975) 26

United States v. Ragins, 840 F.2d 1184 (4th Cir. 1988) 25, 27

United States v. Stricklin, 591 F.2d 1112 (5th Cir.), *cert. denied*, 444 U.S. 963 (1979) 25

United States v. Swindall, 971 F.2d 1531 (11th Cir. 1992), *cert. denied*, 114 S. Ct. 683 (1994) 2, 19, 21, 22

United States v. Tercero, 580 F.2d 312 (8th Cir. 1978) 25

Watkins v. United States, 354 U.S. 178 (1957) 10

STATUTES

15 U.S.C. § 637(a) 5

TABLE OF AUTHORITIES - (*Continued*)

Page

18 U.S.C. § 201(c)(1)(B) 4

18 U.S.C. § 371 4

28 U.S.C. § 1254(1) 3

28 U.S.C. § 1291 . . . . . 6, 24

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c) 4, 15, 16

OTHER AUTHORITIES

Jefferson's Manual and Rules of the House of Representatives Rule XI, C1. 6 (3) (1991) 16

United States Constitution, Article I, § 6 3

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PETITION FOR A WRIT OF CERTIORARI

The decision of the court of appeals in this case represents an unprecedented retreat from the jurisprudence of this Court protecting Members of Congress under the Speech or Debate Clause of the Federal Constitution. Disregarding the consistent admonition that the Speech or Debate Clause must be read broadly to effect its purpose of protecting the legislative process and the legislators themselves, *see, e.g., Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 501-02 (1975) (citations collected); *Gravel v. United States*, 408 U.S. 606, 617 (1972); *Hutchinson v.*

Proxmire, 443 U.S. 111, 124 (1979), the court of appeals applied the narrowest possible reading to the Clause, to the issues raised by Congressman Joseph M. McDade and to the court's own jurisdiction under *Helstoski v. Meanor*, 442 U.S. 500, 506-07 (1979), to deal with prosecutions that threaten legislative autonomy.

Specifically, the court of appeals refused to apply the protections of the Speech or Debate Clause to legislative committees of Congress and to their oversight functions. In so doing, it failed to follow decisions of this Court, and created a conflict between itself and other courts of appeals regarding the Speech or Debate Clause. Accordingly, this petition raises for consideration significant issues of Speech or Debate analysis that are not peculiar to this case alone but rather are issues of general application in Speech or Debate cases: (1) does not the Speech or Debate Clause protect the committee process generally and the oversight functions of congressional committee members in particular? and (2) what pretrial mechanisms are necessary to ensure that a Member's right not to be questioned outside Congress is not vitiated by an unconstitutional trial? In addition, it calls on this Court to resolve the acknowledged conflict between the decision below and the decision of the United States Court of Appeals for the Eleventh Circuit in *United States v. Swindall*, 971 F.2d 1531 (11th Cir. 1992), *cert. denied*, 114 S. Ct. 683 (1994).

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania (A-62 to A-158) is reported at 827 F. Supp. 1153 (E.D. Pa. 1993). The opinion of the United States Court of Appeals for the Third Circuit (A-1 to A-61) is reported at 28 F.3d 283 (3d Cir. 1994). The order of the court of appeals denying the petition for rehearing and suggestion for rehearing in banc (A-159 to A-160) is reported at 28 F.3d 283, 305 (3d Cir. 1994).

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on June 15, 1994. The order denying the petition for rehearing and suggestion for rehearing in banc was entered on August 9, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article I, § 6 of the United States Constitution, which contains the Speech or Debate Clause, provides:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the session of their respective Houses, and in going to and

> returning from the same; *and for any Speech or Debate in either House, they shall not be questioned in any other Place.* (emphasis added)

STATEMENT OF THE CASE

On May 5, 1992, a federal grand jury in the Eastern District of Pennsylvania returned a five-count indictment against The Honorable Joseph M. McDade. Counts one and three of the indictment allege conspiracy under 18 U.S.C. § 371; counts two and four allege violations of the gratuities statute, 18 U.S.C. § 201(c)(1)(B) (formerly § 201(g)); and count five alleges a violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c) ("RICO").

The Department of Justice ("Department") seeks to prove that Congressman McDade abused influence he allegedly had by virtue of his position as ranking minority Member of the House Small Business Committee and of the House Appropriations Committee, Subcommittee on Defense Appropriations. The allegations in the indictment address, *inter alia*, (1) Congressman McDade's oversight efforts as a member of the Subcommittee on Defense Appropriations to monitor implementation of the Subcommittee's appropriation of funds for an Army radio system called "SINCGARS" (A-4 to A-5; A-58 to A-59); (2) Congressman McDade's fact-finding visit, made as a member of the Subcommittee on Defense Appropriations together with other Members of Congress, to determine whether to appropriate funds for a facility that the Department of Defense wanted to purchase; and (3) Congressman McDade's

contacts with the Navy and other contacts with the executive branch in connection with his position on the Small Business Committee, with relation to United Chem Con Corporation ("UCC"), a minority-owned small business under 15 U.S.C. § 637(a) that was admitted into the Minority Small Business and Capital Ownership Program of the Small Business Authority, under the jurisdiction of the Small Business Committee. (A-3 to A-4)

Additionally, the putative RICO enterprise charged in count five of the indictment is defined as an association-in-fact comprised of Congressman McDade's congressional offices in Washington and Scranton and their staffs together with the staff members of congressional committees who worked at his direction, "which enterprise was commonly known as The Office of the Honorable Joseph M. McDade." (A-119) While the charged enterprise expressly includes congressional offices, committee staffs and committee positions, it does not distinguish between the various functions of the staffs that comprise this purported association-in-fact. Nor does it allege that the purported members of the enterprise acted outside the scope of their committee or legislative responsibilities. Indeed, the Department stated that it intends to introduce testimony of the "budgetary process by which Congress authorizes the appropriation of funds to pay for specific military programs." (Government's Omnibus Motion in Limine and Memorandum of Law at 10-11)

Congressman McDade filed an omnibus motion to dismiss the indictment in January 1993. The motion sought, *inter alia*, dismissal of the indictment for violation of the Speech or Debate Clause or, in the alternative, a bill of particulars and an offer of proof by the Department that would demonstrate that, despite the allegations placing Congressman McDade's legislative activities at issue, the trial would not violate the Clause. The district court denied the motion, and Congressman McDade appealed to the United States Court of Appeals for the Third Circuit under 28 U.S.C. § 1291 and *Helstoski II*. The court of appeals affirmed the district court's decision, one judge dissenting in part. Four judges dissented from the denial of Congressman McDade's petition for rehearing.

REASONS FOR GRANTING THE WRIT

This Court has emphasized that the Speech or Debate Clause must be interpreted "liberally, that the full design of it may be answered." *Kilbourn v. Thompson*, 103 U.S. 168, 203 (1880); *see also Eastland*, 421 U.S. at 501-02. "Rather than giving the Clause a cramped construction," *Gravel*, 408 U.S. at 618, it must be construed "liberally, that the full design of it may be answered." *Kilbourn*, 103 U.S. at 203; *see also Eastland*, 421 U.S. at 501-02 (citing cases). Moreover, the Speech or Debate Clause, like the Double Jeopardy Clause, confers a right not to be "questioned," or in other words, not to be subjected to an improper trial, by protecting Members of Congress "not only from the consequences of litigation's results but also from the burden

of having to defend themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967); *see also Helstoski II*, 442 U.S. at 508. The nature of that right must be considered in determining whether a prosecution predicated on committee membership and the exercise of committee oversight functions violates the Clause.

I. AS PART OF ITS PURPOSE OF PROTECTING THE LEGISLATIVE PROCESS, THE SPEECH OR DEBATE CLAUSE PROTECTS THE COMMITTEE PROCESS, OVERSIGHT FUNCTIONS RELATED TO THE COMMITTEE PROCESS, AND COMMITTEE STATUS.

This Court has expressly recognized that committee participation and legislative oversight functions performed pursuant to committee participation are core components of the legislative process. The court of appeals, however, refused to give credence to this Court's interpretation of these elements of the legislative process, which are central in prosecutions of Members of Congress. Moreover, it rejected the holding of the United States Court of Appeals for the Eleventh Circuit in *United States v. Swindall*, *supra*, that committee status is protected by the Speech or Debate Clause. Accordingly, this Court should hear this case to resolve the conflicts and to provide the necessary guidance for the lower courts, which are increasingly confronted with prosecutions implicating the committee process.

A. The Committee Process and Legislative Oversight Are Core Legislative Activities Integral to the Legislative Process.

The court of appeals erred in this case by failing to recognize the integral role that the committee process and legislative oversight play in the protected legislative process. This Court already has held that in addition to literal speech and debate on the floor of either House, the Clause reaches any matters that are "an integral part" of the legislative process. *Gravel*, 408 U.S. at 625. The protections of the Clause thus are triggered by any inquiry into matters that "may fairly be deemed within [the Subcommittee's] province." *Eastland*, 421 U.S. at 506; *see also Gravel*, 408 U.S. at 624. Under *Eastland* and *Gravel*, the committee process is an integral part of the legislative process, and core legislative activity includes committee activity.

In *Gravel*, which arose from senatorial oversight hearings concerning the Vietnam conflict, the Court determined that a legislative aide receives the same immunities under the Speech or Debate Clause as does the Member of Congress for whom the aide performs legislative work. The Court therefore considered the extent to which the immunity extended to the Member of Congress himself. *Gravel*, 408 U.S. at 613. It found "incontrovertible" the claim that the Clause protects a Member of Congress with respect to events occurring at a subcommittee meeting. *Id.* at 615. The Court held that the Clause "protects Members against prosecutions that directly impinge upon or threaten the legislative process," *id.* at 616, because the "fundamental

purpose" of the Speech or Debate Clause is to "free[] the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator." *Id.* at 618. The Clause therefore protects all matters that are "an integral part of the deliberative and communicative processes by which Members participate in *committee* and House proceedings with respect to the consideration and passage or rejection of proposed legislation or *with respect to other matters which the Constitution places within the jurisdiction of either House.*" *Id.* at 625 (emphasis added). Thus, in a case expressly concerning the committee process and the oversight role of Congress, this Court established the touchstone by which to determine when the protections of the Speech or Debate Clause attach.

Similarly, in *Eastland*, the Court held that investigative activities such as issuing subpoenas, performed by Members of Congress in connection with their committee responsibilities, are activities that take place "in a session of the House by one of its members in relation to the business before it." *Eastland*, 421 U.S. at 503 (quoting *Kilbourn*, 103 U.S. at 204). Thus, committee investigative work is protected under the Speech or Debate Clause as "essential to legislating." *Id.* at 504-07 (quoting *Gravel*, 408 U.S. at 621). The Court then examined the subcommittee work at issue in *Eastland* and determined that it fell within the "sphere of legitimate legislative activity" that the Clause protects. *Id.* at 506.

The court of appeals disregarded this essential tenet of Speech or Debate Clause analysis, refusing to hold that the protections of the Clause are triggered by inquiry into a Member's involvement in and oversight performed in connection with congressional committees and subcommittees, whose work is indisputably legislative. (A-15 to A-17) The court of appeals failed to consider that the "act" of legislating is not and never has been limited to drafting, introducing, debating and voting on bills; and that the Clause protects not legislative "acts" as such but rather the "legislative process" as a whole and core legislative functions within that process. Decisions of this Court in addition to *Gravel* and *Eastland* demonstrate that the committee process, as well as its attendant fact-finding and oversight responsibilities, are core legislative activities. *See, e.g., Watkins v. United States*, 354 U.S. 178, 187 (1957); *Sinclair v. United States*, 279 U.S. 263, 297-98 (1929); *McGrain v. Daugherty*, 273 U.S. 135, 151 (1927).

Thus, as this Court already has recognized, Congress functions *both* by passing legislation *and* by such legislative activities as performing committee investigations, overseeing implementation of its legislation, engaging in investigative activities, and appropriating funds as part of the budgetary process. Accordingly, appropriations committees, such as the Subcommittee on Defense Appropriations of which Congressman McDade is a member, have a continuing responsibility to supervise and implement appropriations over which they have jurisdiction. Only by performing such oversight -- whether by committee hearings,

communications and meetings with the appropriate departments within the executive branch, or other means – can the Congress follow through on its legislation and budgetary appropriations to assure that they function as Congress intended.

However, the majority of the court of appeals viewed legislative oversight as entirely separate from legislative activity, and placed it on a spectrum somewhere between such traditionally protected activities as committee hearings and such traditionally unprotected activities as "routine casework for constituents." (A-44) The error in this reasoning is that legislative oversight is as integral to the legislative process as are committee hearings (which in fact often are held for oversight purposes) or votes. Moreover, even though the court of appeals characterized "oversight" as "broad" (A-43), it failed to make any effort (or to require the district court to make any effort) to determine whether the allegations in a particular indictment that are based on legislative oversight and committee involvement fall within the protection of the Speech or Debate Clause. (A-44 to A-46) Rather, the effect of its holding is that the very breadth of congressional oversight removes it from Speech or Debate protection.

Laboring under its fundamental misconception of the role of legislative oversight and committee participation, the court of appeals treated as controlling two decisions by this Court that have no relevance to prosecutions such as this one that rely on committee participation, oversight and

membership. *See United States v. Brewster*, 408 U.S. 501 (1972); *United States v. Johnson*, 383 U.S. 169 (1966). (A-11 to A-14; A-24 to A-26; A-43)

In *Brewster*, this Court held that Senator Brewster could be prosecuted for taking bribes in return for promises to take actions that would, themselves, be protected under the Speech or Debate Clause. The bribes could be proven, only Senator Brewster's actions in response to the bribes could not. The indictment here, however, centers not on any promise of Congressman McDade to perform acts, legislative or otherwise, but on his acceptance of alleged gratuities preceded or followed by his performance of a number of acts that were clearly or at least arguably instances of congressional oversight. (Indictment, Count I, Overt Acts 2, 3, 6, 11, 16-18, 27, 38; Count III, Overt Acts 9, 10, 12, 14, 17; Count V, Acts 9, 17) Those acts must be proven to establish the gratuities. In the face of these allegations, *Brewster* simply does not apply.

The court of appeals also relied on *Brewster* for the proposition that because the Speech or Debate Clause does not prohibit reference to mere membership in Congress (A-14), the Clause also would not prohibit reference to committee membership. (A-16) However, the court of appeals overlooked the fact that, while membership in Congress is a necessary element of the crimes charged in *Brewster* and even in this indictment, committee membership is not a necessary element to be proven in any crime. References to committee membership are gratuitous.

Accordingly, the analogy is flawed, and the court of appeals' reliance on *Brewster* misplaced.

Similarly, in *Johnson*, the Court held that a Member could be prosecuted for attempting to influence the Department of Justice to dismiss a pending indictment. 383 U.S. at 171-72. The court of appeals mischaracterized this narrow holding as stating broadly that "the Speech or Debate Clause does not apply to efforts by members of Congress to influence the Executive Branch." (A-43) In *Johnson*, not only was the contact with the executive a crime in itself, but the Member of Congress had no legislative responsibilities related to the Department of Justice, and thus the contact with the executive branch was "in no wise related to the due functioning of the legislative process." *Id.* at 172. In this case, by contrast, Congressman McDade sat on congressional committees that exercise jurisdiction directly over legislation administered by the very agencies in the executive branch with which he is alleged to have had contact; and those contacts indisputably related to that committee jurisdiction. The court of appeals utterly ignored this critical distinction, instead misapplying *Johnson* to hold that contacts with the executive branch never constitute protected legislative oversight.

Having ignored this Court's holdings in *Gravel* and *Eastland*, and misapplied *Brewster* and *Johnson*, the court of appeals permitted the Department to violate the Speech or Debate Clause in two ways: by pleading Speech or Debate protected activities in the indictment, and by forcing

Congressman McDade to rely on Speech or Debate protected material as the only means to defend himself against the indictment.

1. The Indictment Charges Conduct Directly Protected by the Speech or Debate Clause.

The first four counts of the indictment, regarding the gratuities and conspiracy statutes, include many impermissible references to Speech or Debate protected material. For example, the indictment alleges that Congressman McDade *in his role as ranking minority member of the Subcommittee on Defense Appropriations* contacted officials in the executive branch responsible for implementing a program overseen by that subcommittee and for expending funds appropriated by that subcommittee. (A-45; A-70) Such allegations question Congressman McDade about core legislative activity of the type that *Gravel* defined as "an integral part of the deliberative and communicative processes" of Congress. *Gravel*, 408 U.S. at 625. Indeed, the oversight engaged in by Congressman McDade that is the subject of the indictment is different from that at issue in *Gravel* only in form, not in substance: *Gravel* concerned oversight during a hearing, while this case concerns oversight through correspondence. Nevertheless, the court of appeals focused only on the fact that the allegations involved contact with the executive branch, and held that such contact always falls outside the protected legislative sphere – without ever examining whether the contacts themselves were part of core legislative activities

engaged in as part of the legitimate legislative process, as indeed they were. Had the contact occurred in a formal hearing rather than through informal channels, it undeniably would have been protected. That informal contact, regardless of its characterization by the Department, is equally protected.

The very essence of the RICO count of the indictment demonstrates that it is built entirely on the Speech or Debate protected sphere. The indictment charged an association-in-fact RICO enterprise, defined as follows:

> Defendant Joseph M. McDade supervised the operations of his Congressional offices in Washington, D.C., and in the 10th Congressional District of Pennsylvania, and the activities of the congressional staff Members working in those offices. In addition, he supervised the activities of Congressional staff Members who worked at his direction on the congressional committees on which he held official positions. Defendant Joseph M. McDade, together with these offices and individuals, constituted an enterprise ..., which enterprise was commonly known as The Office of the Honorable Joseph M. McDade.

(A-119) (summarizing allegations) This purported enterprise impermissibly inquires into the core legislative sphere protected by the Speech or Debate Clause; and proof of the enterprise would absolutely require the sort of proof of the legislative process that the Clause forbids.

First, the two committees included in the charged enterprise and their staffs are purely legislative: "professional staff Members . . . shall not be assigned any duties other than those pertaining to committee business." *Jefferson's Manual and Rules of the House of Representatives*, Rule XI, C1. 6 (3) (1991). *Gravel* also makes clear that committee aides receive the same Speech or Debate protection as do Members of Congress. Committee work was a legislative *obligation* for Congressman McDade as a member of the congressional committees. His supervision of committee staff is a legislative act that is a necessary and inescapable aspect of the committee process, which itself is a necessary and inescapable fact of being a Member of Congress. Indeed, the primary reason for the existence of even the personal congressional office is to perform legislative activities, such as drafting legislation and gathering information.[1]

Moreover, the alleged goal of the RICO enterprise was "the use of his Office as a vehicle" allegedly to violate the law. (Indictment, Count V, ¶ 5) However, the Department cannot demonstrate any alleged misuse of "the Office" without contrasting it to the *proper* use of "the Office" – that is, the legislative committees, the congressional offices, their respective staff members, and Congressman McDade's own role on the committees. There can be no question that under this Court's precedents that

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[1] While congressional offices and their staff members may also perform some non-legislative duties such as constituent services, the indictment does not limit their inclusion in the definition of the enterprise to such non-legislative functions.

would violate the Speech or Debate Clause by questioning a Member of Congress as to integral aspects of the legislative process. Yet that is precisely what the court of appeals authorized. (A-32) (speculating on Department's ability to prove enterprise); (*see also* A-85) This Court should grant certiorari to correct that error, both to prevent a trial that contravenes the protections of the Clause and to instruct the courts of appeals more specifically as to the proper application of the Clause in committee-related prosecutions.

2. The Indictment Forces Congressman McDade To Introduce Speech or Debate Protected Material in His Defense.

The Speech or Debate Clause protects Members of Congress not only from prosecutions that directly rely on matters within the protected legislative sphere, but also from being forced to use evidence of such protected matters to defend against a prosecution. This Court has stated that there is "no doubt that [a Member of Congress] may not be made to answer – either in terms of questions *or in terms of defending himself from prosecution* . . . ." *Gravel*, 408 U.S. at 616 (emphasis added); *see also Dombrowski*, 387 U.S. at 85 (Members of Congress are protected by the Clause "from the burden of defending themselves"); *Powell v. McCormick*, 395 U.S. 486, 505 (1969) (the Clause protects Members of

Congress from being "called into court to defend their actions").[2]

If this case is permitted to proceed to a trial, Congressman McDade would be forced to waive his Speech or Debate Clause protection – in violation of the Clause itself. For example, if the Department were permitted to introduce evidence of Congressman McDade's alleged influence solely by virtue of his position as ranking minority Member of the Subcommittee on Defense Appropriations and the Small Business Committee (as the indictment alleges), Congressman McDade could only defend himself by explaining his role on these committees and thus in the legislative process itself – precisely what the Speech or Debate Clause prohibits the Department from doing directly. Nevertheless, the court of appeals held that it would not violate the Clause to force a Member of Congress to choose between his Sixth Amendment right to defend himself and his Speech or Debate right not to be questioned (including forced to defend) for his role in the legislative process. (A-26 to A-28)

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[2] The court of appeals relied on *dicta* from this Court indicating that a Member may be able to waive the Speech or Debate Clause and *choose* to introduce evidence of protected legislative activities. (A-27 to A-28) However, even that question is not settled, and certainly this Court has never held that a prosecution may force a Member of Congress to waive the protections of the Clause in order to defend himself.

The United States Court of Appeals for the Eleventh Circuit specifically held, in contrast to the court of appeals here, that such a choice violates the Speech or Debate Clause:

> The district court prohibited the government from offering proof that Swindall "ever read the bills," but it allowed the jury to *assume* that Swindall read the bills. That the inference refers to a legislative act that possibly never took place does not mitigate the Speech or Debate violation. In fact, it makes it worse: to rebut the inference, Swindall *would be forced to answer for his entire approach to the legislative process* to explain why he did not know of the contents of the bills. Allowing the inference, which virtually compels Swindall to justify his legislative actions, frustrates the purpose of the Speech or Debate privilege.

United States v. Swindall, 971 F.2d at 1546 (first emphasis in original; second emphasis added). The court of appeals' rejection of Congressman McDade's argument that the indictment forces him to answer for, and with, evidence of protected legislative activity, thus conflicts with decisions of this Court and of another court of appeals, and is an appropriate matter for certiorari. (A-26 to A-28)

B. The Court of Appeals Wrongly Held That the Use of Committee Status in the Indictment Did Not Violate the Speech or Debate Clause, Thereby Creating a Conflict Between Circuits.

The court of appeals in this case held that Congressman McDade's committee status, relied on repeatedly in the indictment, was not protected by the Speech or Debate Clause. In so doing, it tried to distinguish the decision of the Court of Appeals for the Eleventh Circuit in *United States v. Swindall*, *supra*, and to the degree it could not distinguish it, rejected that decision. (A-21 to A-26) The *Swindall* court had addressed the issue of whether legislative status pleaded in an indictment, both as distinct from legislative activity and when used as a surrogate for legislative activity, violated the Speech or Debate Clause. It answered affirmatively:

> There are two reasons why the Speech or Debate Clause prohibits inquiry into a member of Congress's committee assignments even if the member's specific legislative acts are not mentioned. First, our review of Supreme Court precedent convinces us that the privilege protects legislative status as well as legislative acts. Second, here the government's inquiry into Swindall's committee memberships actually amounted to an inquiry into legislative acts. The government was allowed to argue a permissive inference that Swindall knew the details of the money-laundering statutes because of his status

> as a member of the Banking and Judiciary Committees. If the inference is drawn that Swindall acquired knowledge of the statutes *through* committee memberships, one sees that Swindall could have acquired such knowledge *only* by performing a legislative act such as reading a committee report or talking to a member of his staff.

Id. at 1543 (emphasis in original).

By contrast, the court of appeals here held that committee status is not protected under any circumstance and that evidence of committee status was not used as a proxy in the indictment against Congressman McDade even though it draws the same sort of "permissive inferences" that the *Swindall* court found violated the Speech or Debate Clause. (A-23 to A-26) This approach creates a direct conflict between the court of appeals' decision in this case and the decision of the Court of Appeals for the Eleventh Circuit in *Swindall*. (A-26) This Court should grant certiorari to resolve that conflict.

Focusing on the essence of the legislative process, the *Swindall* court squarely and correctly held that the use of committee "status" or the mention of committee membership as an evidentiary proxy for actual legislative acts violates the Speech or Debate Clause. It did so not by reference to static categories of "status" and "acts," but rather by a thoughtful analysis of what the Speech or Debate Clause, as interpreted by this Court, directs a court to examine: "does the inquiry into a legislator's committee

membership directly impinge on or threaten the legislative process? Does it make legislators accountable before a possibly hostile judiciary? And does it indirectly impair legislative deliberations?" 971 F.2d at 1545 (citations omitted). The *Swindall* court answered all three questions in the affirmative. The court of appeals here refused even to ask them.

The *Swindall* court also examined the prosecution's case to determine whether references to legislative or committee "status" (as defined by its tripartite inquiry) were also used as a surrogate for use of explicit legislative "acts." It noted that "it is inaccurate to call an inquiry into committee membership an inquiry into status rather than legislative activities" because the reference to committee membership gave rise to a "permissive inference [that] allowed the jury to infer that [the Member of Congress] performed legislative *acts* . . . ." *Id.* at 1546 (emphasis in original). Thus, the *Swindall* court perceived the prosecution's real motive in referring to and proving committee membership – which, as noted *supra*, is distinguishable from congressional membership in that it is not an element of a crime that the prosecution must prove. Yet the court of appeals rejected this aspect of *Swindall* as well – not by distinguishing it on its facts (since it is materially indistinguishable), but rather by repudiating its

legal interpretation of the Clause and this Court's precedents.[3] (A-21 to A-26)

II. ONLY ADEQUATE PRETRIAL PROCEDURES CAN PROTECT A MEMBER'S RIGHT NOT TO BE QUESTIONED OUTSIDE CONGRESS CONCERNING LEGISLATIVE ACTIVITIES.

As already discussed, the Speech or Debate Clause protects Members of Congress "not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski*, 387 U.S. at 85. That protection is an essential component of the Clause. Adequate pretrial procedures give meaning and substance to this aspect of the Clause's protections, and the Court should make pretrial procedures available in all prosecutions of Members of Congress to ensure that the Department does not force Members to defend themselves at trial for protected activity simply because that activity is not patently legislative on the face of an indictment. By failing to require these procedures, the court of appeals erred.

Analogizing Speech or Debate protections to the protections of the Double Jeopardy Clause, this Court recognized in *Helstoski II* that a privilege not to be tried is an empty privilege unless accompanied by a right to a

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[3] The Department has argued that *Swindall* is factually distinguishable because it involved an attempt to prove a Member of Congress's knowledge rather than influence. However, the Department has never articulated why this is a distinction with a difference, and in fact it is not.

pretrial appeal under 28 U.S.C. § 1291. Relying on its opinion in *Abney v. United States*, 431 U.S. 651 (1977), concerning the right to a pretrial appeal of a Double Jeopardy claim, the Court held that "if a Member 'is to avoid *exposure* to [being questioned for acts done in either House] and thereby enjoy the full protection of the Clause, his . . . challenge to the indictment must be reviewable before . . . exposure [to trial] occurs.'" *Helstoski II*, 442 U.S. at 508 (quoting *Abney*, 431 U.S. at 662). A Member has the right to a pretrial appeal because, as in a prosecution implicating the Double Jeopardy Clause, the challenge is to "'the very authority of the Government to hale him into court to face trial'" and the "'rights conferred . . . by the . . . Clause would be significantly undermined if appellate review of . . . claims were postponed until after conviction and sentence.'" *Helstoski II*, 442 U.S. at 507 (quoting *Abney*, 431 U.S. at 659, 660).

For the same reasons, pretrial procedures are necessary to effectuate a Member's right to a pretrial appeal on Speech or Debate grounds. As with First Amendment protections, the Department should be required to plead an indictment with specificity under a heightened pleading standard because of the constitutional implications to the indictment of a Member of Congress. *National Organization for Women, Inc. v. Scheidler*, 114 S. Ct. 798, 807 (1994) (Souter, J. and Kennedy, J., concurring) (heightened pleading required in First Amendment RICO case). Next, there must be a pretrial proceeding in which an appropriate record can be made to test a Speech or Debate claim. Rules must exist

about going forward with proof, burden of persuasion and weight of the evidence. Finally, there must be a procedure that takes account of other constitutional rights, such as the privilege against self-incrimination. As in the Double Jeopardy context, *see, e.g., United States v. Ragins*, 840 F.2d 1184, 1192 (4th Cir. 1988), once the Member makes a prima facie, non-frivolous claim that the prosecution seeks to rely on matters that are within the sphere of legitimate legislative activity, the burden shifts to the Department to show that there is no violation of the Clause's protection. These procedures will advance the "practical" reading of the Clause that recognizes that legislative action frequently occurs outside "the four walls of either Chamber," *Hutchinson v. Proxmire*, 443 U.S. 111, 124 (1979), and enforce the Clause's prohibition on "any showing of how [a legislator] acted, voted, or decided." *Brewster*, 408 U.S. at 527. The court of appeals erred by rejecting these procedures.

While this Court has not yet addressed whether pretrial procedures accompany the Speech or Debate right to appeal, it has recognized with approval that every court of appeals to have considered the issue[4] has held that the same

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[4] *United States v. Ragins*, 840 F.2d 1184, 1192 (4th Cir. 1988); *United States v. Loyd*, 743 F.2d 1555, 1562-63 (11th Cir. 1984); *United States v. Booth*, 673 F.2d 27, 30-31 (1st Cir.), *cert. denied*, 456 U.S. 978 (1982); *United States v. Bendis*, 681 F.2d 561, 564 (9th Cir.), *cert. denied*, 459 U.S. 973 (1982); *United States v. Jabara*, 644 F.2d 574, 576-77 (6th Cir. 1980); *United States v. Stricklin*, 591 F.2d 1112, 1124 (5th Cir.), *cert. denied*, 444 U.S. 963 (1979); *United States v. Tercero*, 580 F.2d 312, 315 n.12 (8th Cir. 1978); *United States v. Inmon*, 568 F.2d 326, 331-32 (3d Cir. 1977); *United States*

procedures are a necessary consequence of the *Abney* right to an appeal of a Double Jeopardy claim. *See Grady v. Corbin*, 495 U.S. 508, 522 n.14 (1990) (citing *Ragins*, 840 F.2d at 1192), *overruled on other grounds by United States v. Dixon*, 113 S. Ct. 2849 (1993). The Court described a pretrial challenge to the prosecution's evidence as an "essential procedural mechanism" for assessing claims and implementing the Double Jeopardy guarantee against successive prosecutions for the same offense. *Grady*, 495 U.S. at 522 n.14. Those pretrial procedures likewise are an essential mechanism for implementing a Member's constitutional right not to be exposed to trial for his legislative acts and motivations.

In *Ragins*, the Fourth Circuit explained why pretrial procedures are necessary to protect the right not to be tried under the Double Jeopardy Clause:

> When a double jeopardy claim is raised before commencement of the second trial, however, a defendant is at a serious disadvantage in attempting to prove the identity of the successive offenses charged to him. There is as yet no record from the second trial, and the rules of criminal procedure give the defendant little opportunity to discover the proof on which the government intends to rely in that trial. He must therefore rely on the

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v. Mallah, 503 F.2d 971, 986 (2d Cir.), *cert. denied*, 420 U.S. 995 (1975); *United States v. Castro*, 629 F.2d 456, 466 (7th Cir. 1980) (Fairchild, C.J., concurring).

> indictments themselves, his own testimony, and any testimony he can obtain from his co-defendants and other third-parties. But the government controls the precision with which the second offense is charged, the defendant's own testimony is unlikely to carry much weight, and he is unable to offer his co-defendants immunity for their testimony. Unless the prosecution is utterly inept in drafting the two indictments, then, it will often be impossible for the defendant to carry the burden of proving that the two offenses charged against him are in reality one and the same.

Ragins, 840 F.2d at 1191-92; *see also Inmon*, 568 F.2d at 329-30, 332.

Those same considerations apply with equal force to a Speech or Debate challenge to an indictment, and the analysis of the court of appeals below conflicts with that of the circuit courts of appeals cited above. Where the indictment is not "utterly inept," a Member has limited information to demonstrate that the charged conduct consists of protected legislative activity compelled by the committee process and "generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn*, 103 U.S. at 204. This is especially true here, where the prosecution is not predicated on promises to perform legislative acts and Congressman McDade is challenging the indictment on a motion to dismiss without the benefit of any evidentiary record or showing by the Department as to how it will use Congressman McDade's

committee memberships and responsibilities. Indeed, the Department predicated its indictment on the theory that executive contact is *per se* unprotected, which draws into question the validity of the entire prosecution. (*See, e.g.*, Government's Response to the Defendant's Motion to Dismiss the Indictment Based Upon the Speech or Debate Clause at 9, 12) Without pretrial procedures, an erroneous presumption such as this will result in an unconstitutional trial.

Congressman McDade has argued that these procedures are part and parcel of the right not to be tried and to a pretrial appeal, yet the court of appeals refused even to address this critical aspect of his appeal.[5] The resulting vacuum opens the door to prosecutions that cannot be scrutinized until the trial itself, at which point the Speech or Debate Clause already will have been irreparably violated. Accordingly, the Court should grant this petition and require district courts to follow those procedures in any

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[5] The court of appeals invoked the collateral order doctrine and considered the issue of pretrial procedures of insufficient importance for the court to address. (A-46 to A-51) However, each of the issues raised by Congressman McDade – dismissal, excising, bill of particulars, offer of proof and accompanying burdens of proof – was (1) conclusive, (2) resolved an important issue completely separate from the merits, and (3) will be effectively unreviewable on appeal from a final judgment. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 114 S. Ct. 1992, 1995-96 (1994); *Helstoski II*, 442 U.S. at 506. "When a policy is embodied in a constitutional . . . provision entitling a party to immunity from suit . . . there is little room for the judiciary to gainsay its 'importance.'" *Digital Equip.*, 114 S. Ct. at 2001.

prosecution of a Member of Congress who raises on a motion to dismiss or otherwise before trial a prima facie, non-frivolous claim of a prosecution's reliance on acts within the legislative sphere. In light of the increasing frequency with which the Department is bringing indictments against Members of Congress, it is vital that the Court address this issue and provide guidance for the lower courts.

The need to address the availability of pretrial procedures to test Speech or Debate claims is particularly acute with respect to legislative oversight activity. The legislative character of oversight activity is not always apparent (A-43 to A-44; A-56 to A-57), and pretrial procedures allow a court to unmask legislative activity shrouded by the various allegations of an indictment. *See Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) (Members protected from "cost and inconvenience and distractions of a trial upon a conclusion of the pleader."). This is equally true with respect to the Department's use of committee membership, which may serve as a proxy for legislative acts. The court of appeals, however, failed to establish any pretrial procedures to ensure, *before* submitting a Member of Congress to a potentially unconstitutional trial, that a prosecution does not encroach upon the protected sphere. (A-44 to A-46) Instead, it provided only hypothetical speculation – whose accuracy cannot be determined on this record – that the prosecution would not violate the Clause. (A-32) Only pretrial procedures can guarantee the Clause's absolute constitutional right not to be questioned for legislative acts.

CONCLUSION

For the foregoing reasons, petitioner Joseph M. McDade respectfully requests that this Court grant his petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Dated: November 7, 1994

** Counsel of Record*

Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court of the United States
October Term, 1994

JOSEPH M. MCDADE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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182

TABLE OF CONTENTS

Opinion of the United States Court of Appeals for the Third Circuit in *United States of America v. Joseph M. McDade*, dated June 15, 1994 . . . . . A-1

Opinion of the United States District Court for the Eastern District of Pennsylvania in *United States of America v. Joseph M. McDade*, dated May 6, 1993 . . . . . A-62

Order of the United States Court of Appeals for the Third Circuit in *United States of America v. Joseph M. McDade*, denying petition for rehearing and suggestion for rehearing in banc, dated August 9, 1994 . . . . . A-159

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-1487

UNITED STATES OF AMERICA

v.

JOSEPH M. McDADE,

Appellant.

On Appeal From The United States District
Court For The Eastern District Of Pennsylvania
(D.C. Criminal No. 92-00249-01)

Argued: December 2, 1993

Before: SCIRICA and ALITO, *Circuit Judges*
and BASSLER, *District Judge*[*]

(Opinion Filed: June 15, 1994)

OPINION OF THE COURT

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[*] Hon. William G. Bassler, United States District Judge for the District of New Jersey, sitting by designation.

ALITO, Circuit Judge:

Joseph M. McDade, a member of the United States House of Representatives, took this appeal from a pretrial order in the criminal prosecution now pending against him in federal district court. The order in question denied a variety of defense motions, including a request for dismissal of all or portions of his indictment under the Speech or Debate Clause of the Constitution, Art. 1, § 6, cl. 1. We affirm the district court's rulings relating to dismissal of the indictment under the Speech or Debate Clause, but we hold that we lack jurisdiction at this time to review the district court's other rulings.

I.

In May 1992, a federal grand jury in the Eastern District of Pennsylvania returned a five-count indictment against the defendant. Counts I and III charge that the defendant entered into two separate conspiracies, in violation of 18 U.S.C. § 371. Each of these conspiracies allegedly had two objectives: first, defrauding the United States of the defendant's honest, loyal, and faithful service and other intangible benefits and, second, "directly and indirectly seeking, accepting and receiving things of value for and because of official acts performed and to be performed by [the defendant] otherwise than as provided by law for the proper discharge of his official duty," in violation of what is

now 18 U.S.C. § 201(c)(1)(B).[1] Both counts begin by stating that the defendant was a member of Congress during the relevant period, that he became the ranking minority member of the House Small Business Committee "in or about 1982," and that he became the ranking minority member of the House Appropriations Committee, Subcommittee on Defense Appropriations "[i]n or about January, 1985."

Count I, which contains considerable factual detail, alleges a conspiracy involving a minority-owned small business called United Chem Con Corporation ("UCC"), its president and majority stockholder (James B. Christian), and its attorney and lobbyist (Raymond S. Wittig), who had previously served as minority counsel to the House Small Business Committee during the time when the defendant was the committee's ranking minority member. Count I alleges that, as part of the conspiracy it charges, the defendant "would and did solicit, accept and receive money and other things of value, directly and indirectly, from UCC, Christian and Wittig in the form of sham campaign contributions, free aircraft transportation, vacations and other gratuities in return for his influence and because of his support for UCC's interests in obtaining and maintaining UCC's government contracts and Small

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[1] Prior to 1986, this provision was designated as 18 U.S.C. § 201(g).

Business Administration program eligibility." Count I further alleges, among other things, that as part of the conspiracy the defendant "would and did, for money and other things of value, use his influence to intercede and cause others to intercede with employees of the Department of the Navy, SBA, United States Postal Service and other departments and agencies" to obtain favorable treatment for UCC. Count I lists 47 overt acts, including the defendant's writing of letters to Navy and SBA officials on UCC's behalf and the defendant's taking of trips that were paid for by UCC.

Count III charges a somewhat similar conspiracy involving several defense contractors (the Grumman Corporation, the Kane Paper Corporation, and the Sperry Corporation and its corporate successors), as well as James Kane (the president and chief executive officer of Kane Paper) and Charles Gardner (a vice-president of Sperry). Count III, which also contains detailed factual allegations, alleges that, as part of this conspiracy, "James Kane and Charles Gardner would and did join forces in order to influence public officials including [the defendant], with respect to their official actions on behalf of Grumman and Sperry, by providing money and other things of value, including sham campaign contributions, free vacations and private aircraft transportation to public officials, and 'scholarships' for the children of public officials." Count III lists 18 overt acts, including the defendant's

writing of a letter to the Secretary of the Army concerning an Army radio system, known as SINCGARS (Single Channel Ground and Airborne Radio System), for which Grumman was seeking a "second source" contract.

Count II charges that the defendant violated 18 U.S.C. § 201(c)(1)(B) by soliciting, accepting, receiving, and agreeing to receive "the payment of round-trip aircraft transportation expenses by UCC from Washington, D.C. to Scranton, Pennsylvania, for and because of official acts performed and to be performed by [the defendant], otherwise than as provided by law for the proper discharge of official duty." Count IV charges that the defendant violated this same provision by soliciting, accepting, receiving, and agreeing to receive "free aircraft transportation from Washington, D.C. to Philadelphia, Pennsylvania, and then to Scranton, Pennsylvania from Philadelphia, Pennsylvania, from the Grumman Corporation, for and because of official acts performed and to be performed by [the defendant], otherwise than as provided by law for the proper discharge of official duty."

Finally, Count V charges that the defendant conducted and participated in conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c). Count V states that this enterprise consisted of the defendant, "his

Congressional offices in Washington, D.C., and in the 10th Congressional District of Pennsylvania," the staff members working in those offices, and "staff members who worked at his direction on the congressional committees on which he held official positions." As predicate acts, Count V charges that the defendant solicited, agreed to receive, and accepted bribes[2] and illegal gratuities,[3] and committed acts of extortion.[4]

In January 1993, the defendant filed what he styled an "omnibus" motions package. Among other things, these motions sought dismissal of all or portions of the indictment on the ground that it violated the Speech or Debate Clause. A bill of particulars and an offer of proof were also requested. After a hearing, the district court denied all of these requests. *United States v. McDade,* 827 F.Supp. 1153 (E.D.Pa.1993). The defendant then took this appeal, invoking our jurisdiction under 28 U.S.C. § 1291 and the collateral order doctrine as applied in *Helstoski v. Meanor,* 442 U.S. 500, 506-07, (1979).

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[2] *See* 18 U.S.C. § 201(c) (1982) (redesignated as 18 U.S.C. § 201(b)(2) in 1986).

[3] *See* 18 U.S.C. § 201(g) (1982) (redesignated as 18 U.S.C. § 201(c)(1) in 1986).

[4] *See* 18 U.S.C. § 1951(a).

II.

Before addressing the arguments raised by the defendant, we will first comment briefly on the basis for and the scope of our appellate jurisdiction. As noted, the defendant relies on the collateral order doctrine, under which a district court order entered prior to final judgment is immediately appealable if it (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the case, and (3) is effectively unreviewable on appeal from a final judgment. *See, e.g., Digital Equipment Corp. v. Desktop Direct, Inc.*, 62 U.S.L.W. 4457, 4458 (June 6, 1994); *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799, (1989); *Abney v. United States*, 431 U.S. 651, 659-62, (1977); *Kulwicki v. Dawson*, 969 F.2d 1454, 1459 (3d Cir.1992). Recent cases have emphasized that the second prong of this test requires both that the issue be "important" and that it be completely separate from the merits. *Digital Equipment*, 62 U.S.L.W. at 4461-62; *United States v. Santtini*, 963 F.2d 585, 592 (3d Cir.1992) (citing *Praxis Properties, Inc. v. Colonial Sav. Bank*, 947 F.2d 49, 58 (3d Cir.1991)).

In *Helstoski v. Meanor*, 442 U.S. at 506-08, the Supreme Court held that all of the requirements of the collateral order doctrine were met by a district court order refusing to dismiss an indictment pursuant to the

Speech or Debate Clause. The Court reasoned: (1) that this order represented "'a complete, formal and, in the trial court, final rejection'" of the claim that the indictment should be dismissed on this ground, *id.* at 506 (quoting *Abney*, 431 U.S. at 659); (2) that a Speech or Debate Clause claim is "'collateral to, and separable from, the principal issue at the accused's impending criminal trial, i.e., whether or not the accused is guilty of the offense charged,'" *id.* at 507 (quoting *Abney*, 431 U.S. at 659); and (3) that part of the protection conferred by the Speech or Debate Clause would be irreparably lost if an appeal had to await the final judgment, since "the Speech or Debate Clause was designed to protect Congressmen 'not only from the consequences of litigation's results but also from the burden of defending themselves,'" *id.* at 508 (quoting *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967)).

Under this precedent, we have jurisdiction to entertain the defendant's claim that the Speech or Debate Clause requires dismissal of the entire indictment or particular charges contained in the indictment. We also have jurisdiction to review any of the district court's other rulings regarding the Speech or Debate Clause that satisfy all of the requirements of the collateral order doctrine. Our jurisdiction, however, extends no further. *See Abney*, 431 U.S. at 663. "Adherence to [the] rule of finality has been particularly stringent in criminal prosecutions because

'the delays and disruptions attendant upon intermediate appeal,' which the rule is designed to avoid, 'are especially inimical to the effective and fair administration of the criminal law.'" *Id.* at 657 (quoting *DiBella v. United States*, 369 U.S. 121, 126, (1962)). *See also Midland Asphalt*, 489 U.S. at 799; *Flanagan v. United States*, 465 U.S. 259, 265 (1984). Consequently, we must be especially careful not to exceed the scope of the limited appellate jurisdiction conferred on us by the collateral order doctrine.

III.

A. Turning to the arguments raised by the defendant, we first consider his contention that the Speech or Debate Clause required dismissal of the entire indictment because it contains references to his position as ranking minority member of both the House Subcommittee on Defense Appropriations and the House Small Business Committee. Relying heavily on *United States v. Swindall*, 971 F.2d 1531 (11th Cir.1992), *cert. denied*, 114 S.Ct. 683 (1994), the defendant asserts that "[a]pplication of the Speech or Debate Clause does not require, as the district court myopically construed it, a mechanical inquiry into whether the legislative matter involved consists of either 'acts' or 'status.'" Appellant's Br. at 18-19. Instead, the defendant contends that use of committee membership or position "as a proxy for legislative activity . . . contravenes the Speech

or Debate Clause." *Id.* at 41. He goes on to explain that the indictment in this case impermissibly employs his "membership and function on the committees" as a proxy for protected legislative acts, viz., "what he did on the committee prior to the purported agreement" and "what he did and was able to do at the time of the purported agreement." *Id.* at 42.

We reject these arguments. We will first explain why proof of legislative status, including status as a member or ranking member of a committee, is not prohibited by the Speech or Debate Clause.[5] We will then discuss *Swindall* and explain why we do not believe that the decision in that case supports the defendant's position here.[6] In doing so, we will explain why proof of the defendant's legislative status will not constitute a "proxy" for proof of legislative acts.

B. It is now well settled – and it is conceded by the defendant[7] – that the Speech or Debate Clause does not prohibit proof of a defendant's status as a member of the United States Senate or House of Representatives. Title 18, Section 201 of the United States Code includes two criminal offenses involving

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[5] *See* parts III.B. and III.C. of this opinion.

[6] *See* part III.D. of this opinion.

[7] Appellant's Br. at 41 n.24.

bribes and illegal gratuities that require proof of the defendant's membership in Congress. See 18 U.S.C. §§ 201(b)(2), 201(c)(1)(B). Similar provisions have existed for more than a century,[8] and governing precedent makes it clear that members of Congress may be prosecuted under such provisions without violating the Speech or Debate Clause.

In *United States v. Brewster*, 408 U.S. 501 (1972), the Supreme Court held that the defendant, a former senator, could be prosecuted under an indictment requiring proof of his legislative status. In that case, the indictment charged that the defendant had solicited, agreed to receive, and accepted bribes in return for being influenced in the performance of official acts in his capacity as a member of the Senate and a Senate committee. The indictment also charged him with receiving a gratuity for and because of official acts that he had performed in that capacity. The district court dismissed the indictment on the ground that the Speech or Debate Clause shields a member of Congress "from any prosecution for alleged bribery to perform a legislative act." *See id.* at 504 (internal quotations and citations omitted).

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[8] *See United States v. Helstoski*, 442 U.S. 477, 493 n.8 (1979).

On direct appeal, however, the Supreme Court reversed. The Court first held that the Speech or Debate Clause did not prohibit proof that the defendant solicited, agreed to accept, or took bribes in return for being influenced in the performance of legislative acts. The Court stated:

> The illegal conduct is taking or agreeing to take money for a promise to act in a certain way. There is no need for the Government to show that [the defendant] fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise.
>
> Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. . . . And an inquiry into the purpose of a bribe "does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them."

Id. at 526 (quoting *United States v. Johnson,* 383 U.S. 169, 185 (1966)).

The Court further held that the Speech or Debate Clause did not prohibit proof that the defendant had solicited, agreed to receive, or accepted money for or because of official acts that had already been performed. The Court explained:

> To sustain a conviction [for this offense] it is necessary to show that [the defendant] solicited, received, or agreed to receive, money with knowledge that the donor was paying him compensation for an official act. Inquiry into the legislative performance itself is not necessary; evidence of the Member's knowledge of the alleged briber's illicit reasons for paying the money is sufficient to carry the case to the jury.

Id. at 527. Thus, *Brewster* clearly means that the Speech or Debate Clause permits a defendant to be prosecuted under an indictment alleging that, as a member of Congress, he or she solicited, agreed to receive, or accepted bribes or illegal gratuities. Since such a prosecution necessitates proof of the defendant's status as a member of Congress, *Brewster* establishes that such proof is allowed.

In *United States v. Helstoski*, 576 F.2d 511 (3d Cir.1978) ("*Helstoski I*"), *aff'd*, 442 U.S. 477 (1979), this court, applying *Brewster*, likewise held that a member of Congress could be prosecuted under an indictment requiring proof of his status as a member. There, a member of the House of Representatives had been indicted for soliciting and receiving payments in return for being influenced in the performance of official acts, as well as for conspiracy to commit such offenses. Relying on *Brewster*, the district court had refused to

dismiss the indictment.[9] The defendant petitioned this court for a writ of mandamus, but we denied the petition, stating that "*Brewster* compel[led] the conclusion that the indictment . . . [did] not violate the Speech or Debate Clause" because the charges could be proven without showing that the defendant actually performed "any legislative acts."[10] *Id.* at 517. Consequently, our decision in *Helstoski I*, like *Brewster*, clearly establishes that the Speech or Debate Clause permits proof of a defendant's status as a member of Congress.

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[9] The district court also held that proof of past legislative acts would not be permitted. The government appealed this ruling under 18 U.S.C. § 3731, but both this court and the Supreme Court affirmed. *See United States v. Helstoski I*, 576 F.2d 511 (3d Cir. 1978). *aff'd*, 442 U.S. 477 (1979).

[10] The Supreme Court affirmed this portion of our decision on the ground that mandamus was not the appropriate vehicle for seeking review of the district court's order refusing to dismiss the indictment under the Speech or Debate Clause, since that order was "final" under the collateral order doctrine and was thus appealable under 28 U.S.C. § 1291. *Helstoski v. Meanor*, 442 U.S. 500. On remand, the district court dismissed the indictment, holding that evidence protected by the Speech or Debate Clause tainted the grand jury's deliberations, and this court affirmed. *United States v. Helstoski*, 635 F.2d 200 (3d Cir.1980).

C. Once this point is recognized, it follows that the Speech or Debate Clause also permits proof of a defendant's status as a member of a congressional committee or as the holder of a committee leadership position. Article I, § 6 of the Constitution, which contains the Speech or Debate Clause, provides, in relevant part, as follows (emphasis added):

> *The Senators and Representatives* shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; *and for any Speech or Debate in either House, they shall not be questioned in any other Place.*

This language confers rights on members of Congress in their capacity as members; it makes no reference to membership on a congressional committee or to any other position held within Congress. Consequently, we see no textual basis for arguing that a member of Congress may obtain greater protection under the Speech or Debate Clause by becoming a member of a congressional committee or attaining a leadership position. Furthermore, we are aware of no other evidence that the Speech or Debate Clause was

intended to provide greater protection for committee members or congressional leaders, and no decision of the Supreme Court or of this court supports such an argument.

It is also noteworthy that the indictment in *Brewster,* like the indictment in this case, made specific reference to the defendant's committee status. The opinion of the Court in *Brewster* noted that four counts of the indictment charged the defendant with violating the federal bribery statute "while he was a Senator and *a member of the Senate Committee on Post Office and Civil Service.*" 408 U.S. at 502 (emphasis added). Justice Brennan's dissent likewise noted that these counts "charged Senator Brewster with receiving $19,000 'in return for being influenced in his performance of official acts in respect to his action, vote, and decision on postage rate legislation which might at any time be pending before him in his official capacity [*as a member of the Senate Post Office Committee*].'" *Id.* at 529 (Brennan, J., dissenting) (brackets in original) (emphasis added). Nevertheless, the Court held that the Speech or Debate Clause did not prohibit the defendant's prosecution on these charges.

Accordingly, we agree with the district court in this case that the Speech or Debate Clause does not require dismissal of any count of the indictment simply

because it refers to the defendant's status as a member or ranking member of two congressional committees.

D. In arguing that the indictment in this case must be dismissed because of its references to his committee memberships and positions, the defendant relies chiefly on the Eleventh Circuit's decision in *United States v. Swindall*, 971 F.2d 1531. When *Swindall* is properly understood, however, we do not believe that it supports the defendant's position here.

1. While a member of the House of Representatives, Congressman Swindall sat on committees that considered two statutes, 18 U.S.C. § 1956 and 31 U.S.C. § 5324, prohibiting "money laundering" and the "structuring" of financial transactions to avoid reporting requirements. Congressman Swindall subsequently attempted to sell a large promissory note that he held, and he turned for assistance to an associate, Charles LeChasney, who was laundering money for a federal agent posing as a representative of drug dealers. Through LeChasney, Congressman Swindall met and spoke with the undercover agent about the sale of the note, but he ultimately decided not to go through with the transaction. After LeChasney was indicted for money laundering, Congressman Swindall testified before a grand jury concerning his discussions about the sale of the note. He was then indicted on ten counts of making

false statements before the grand jury and was later convicted on nine of these counts. *See* 971 F.2d at 1538-39.

On appeal, the Eleventh Circuit held that three of these convictions had to be reversed because they had been obtained using evidence barred by the Speech or Debate Clause. The statements on which these three counts were based all related to Congressman Swindall's knowledge that the statutes noted above prohibited some of the financial transactions that had been discussed. The Eleventh Circuit wrote that during the grand jury proceedings the prosecutor had "sought to establish, by questioning Swindall, that because of his memberships on the House Banking and Judiciary Committees, Swindall had knowledge of the money-laundering and transaction-structuring statutes." *Id.* at 1539 (footnote omitted).[11] Concluding that this questioning violated the Speech or Debate Clause, the court explained:

> There are two reasons why the Speech or Debate Clause prohibits inquiry into a member of Congress's committee assignments even if the member's specific legislative acts are not mentioned. First,

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[11] The court added that the prosecution had used the same tactic at Swindall's trial. *See id.* at 1542.

> our review of Supreme Court precedent convinces us that the privilege protects legislative status as well as legislative acts. Second, here the government's inquiry into Swindall's committee memberships actually amounted to an inquiry into legislative acts. The government was allowed to argue a permissive inference that Swindall knew the details of the money-laundering statutes because of his status as a member of the Banking and Judiciary Committees. If the inference is drawn that Swindall acquired knowledge of the statutes *through* committee memberships, one sees that Swindall could have acquired such knowledge *only* by performing a legislative act such as reading a committee report or talking to a member of his staff.

Id. at 1543 (emphasis in original). The court then devoted a separate section of its opinion to each of these "reasons." *Id.* at 1544-46.

Addressing the first reason in a portion of its opinion bearing the heading "The Speech or Debate Clause and Legislative Status," *id.* at 1544, the court argued that Supreme Court precedent did not draw "a distinction between 'activity' and 'status,'" but instead called for an inquiry into whether allowing questioning about committee membership would undermine the

legislative process or legislative independence.[12] *Id.* at 1545. The court then concluded that these harmful effects would be threatened if prosecutors were permitted to use a member's committee assignments for the purpose of establishing the member's knowledge of the contents of bills considered by the committee. *Id.*

Turning to the second reason in the portion of its opinion bearing the heading "Swindall's Legislative Activities, Not Merely His Status, Were The Subject of The Government's Inquiry," *id.* at 1546, the court argued that the government had used Swindall's committee memberships to show that he had performed legislative acts, *i.e.*, that he had read or otherwise acquired knowledge of the contents of the bills in question. The court wrote: "The government introduced evidence of Swindall's committee memberships to prove that he performed a legislative

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[12] Specifically, the court wrote:

> Rather than calling for a distinction between "status" and "activity," Supreme Court precedent directs us to ask: does inquiry into a legislator's committee memberships directly impinge on or threaten the legislative process? Does it make legislators accountable before a possibly hostile judiciary? And does it indirectly impair legislative deliberations? The answer to each of these questions is yes.

Swindall, 971 F.2d at 1545 (citations omitted).

act to acquire knowledge of the contents of the bills, which is precisely what the clause prohibits." *Id.*

2. While the *Swindall* opinion contains language that may be read out of context to mean that the Speech or Debate Clause flatly prohibits proof of legislative status, we believe that a close examination of the *Swindall* opinion and its reasoning suggests that the court did not intend to adopt such a broad holding. As previously noted, the portion of the opinion devoted to the discussion of legislative status asserts that the distinction between legislative "status" and legislative "activity" is not dispositive for Speech or Debate Clause purposes and that a court entertaining a Speech or Debate Clause claim should instead consider whether permitting the prosecution to inquire into a member's committee status would undermine the legislative process or legislative independence. If the *Swindall* court had meant to hold that proof of legislative or committee status is *never* allowed for any purpose, one would expect the court to have argued, as the next step in its chain of reasoning, that such proof *always* undermines the legislative process and legislative independence. Instead, however, the *Swindall* court rested on a much narrower argument, namely, that the legislative process and legislative independence would be undermined if prosecutors could inquire into a member's committee status *for the purpose of showing that the member had acquired knowledge of the contents*

of the bills considered by his or her committees. The court wrote:

> It seems obvious that levying criminal or civil liability on members of Congress for their knowledge of the contents of the bills considered by their committees threatens or impairs the legislative process. . . .
>
> If legislators thought that their personal knowledge of such bills could one day be used against them, they would have an incentive (1) to avoid direct knowledge of a bill and perhaps even memorialize their lack of knowledge by avoiding committee meetings or votes, or (2) to cease specializing and attempt to become familiar with as many bills as possible, at the expense of expertise in any one area. Either way, the intimidation caused by the possibility of liability would impede the legislative process.

Id. at 1545. This reasoning does not suggest that permitting inquiry into committee membership should never be allowed, but only that such inquiry should not be allowed when made for the limited purpose discussed.

Based on this understanding of *Swindall's* discussion of legislative status, we do not believe that

that discussion supports the defendant's position here. In this case, the indictment does not recite, and the prosecution does not propose at trial to use, the defendant's committee memberships or positions for the purpose of establishing that he thereby acquired knowledge of bills under consideration by the committee. Accordingly, *Swindall's* holding regarding legislative status is inapplicable.

3. Similarly, the defendant in this case is not aided by *Swindall's* discussion of legislative "activities." In *Swindall*, according to the Eleventh Circuit, the government used proof of the defendant's membership on certain committees to show that he had performed what the court regarded as legislative acts, i.e., reading or otherwise acquiring knowledge about bills considered by those committees. Attempting to analogize his situation to that in *Swindall*, the defendant in this case argues as follows:

> Just as evidence of membership on the House Banking and Judiciary committees in Swindall implied knowledge of the money laundering and transaction structuring statutes . . . so evidence of Congressman McDade's membership and function on the committees is a proxy for what he did on the committee prior to the purported agreement and what he did and was able to do at the time of the purported agreement. Stated differently,

> Congressman McDade acquired these abilities only through the committee memberships and only by performing legislative acts.

Appellant's Br. at 42.

This argument is fallacious and is contrary to the Supreme Court's reasoning in leading Speech or Debate Clause decisions. In those decisions, the Court has held that the Clause prohibits only proof that a member actually performed a legislative act. As the Court has put it, the protection of the Clause "extends only to an act that has already been performed." *United States v. Helstoski*, 442 U.S. at 490. Thus, the Court has held, the Clause does not prohibit closely related but nevertheless distinct showings, such as that a member promised to perform a legislative act in the future or even that a member was thought to have performed a legislative act in the past and was paid in exchange for or because of it. *See id.*; *Brewster*, 408 U.S. at 526-27. Once this is recognized, the fallacy in the defendant's argument is apparent, for in this case the indictment relies on the defendant's committee status, not to show that he actually performed any legislative acts, but to show that he was thought by those offering him bribes and illegal gratuities to have performed such acts and to have the capacity to perform other similar acts.

That the argument made by the defendant in this case is contrary to *Brewster* and *United States v. Helstoski* can be demonstrated by showing that precisely the same argument could have been made for the purpose of establishing that the Speech or Debate Clause prohibited proof of Senator Brewster's or Representative Helstoski's membership in Congress. Thus, if the previously quoted statement from the defendant's brief were correct, the following version of that statement (in which references to the defendant have been replaced by references to Senator Brewster and Representative Helstoski) would also be correct:

> Just as evidence of membership on the House Banking and Judiciary committees in *Swindall* implied knowledge of the money laundering and transaction structuring statutes ... so evidence of [Senator Brewster's or Representative Helstoski's] membership [in Congress] is a proxy for what he did [in Congress] prior to the purported agreement and what he did and was able to do at the time of the purported agreement. Stated differently, [Senator Brewster or Representative Helstoski] acquired these abilities only through [their membership in Congress] and only by performing legislative acts.

We know, however, that the Speech or Debate Clause did not prohibit proof of Senator Brewster's or Congressman Helstoski's membership in Congress. Likewise, in this case, the Speech or Debate Clause does not prohibit proof of the defendant's committee status for the purposes proffered by the prosecution.

In sum, we do not believe that *Swindall*, when properly understood, supports the defendant's arguments in this case. If, however, we have misinterpreted the intended meaning of the *Swindall* court and that court meant to embrace the proposition that the Speech or Debate Clause broadly prohibits proof of legislative or committee status, we would be compelled, for the reasons already explained, to disagree.

IV.

The defendant also contends that the indictment in this case violates the Speech or Debate Clause because it will force him to introduce evidence of legislative acts in order to refute the charges against him. Again, we disagree.

First, the text of the Speech or Debate Clause does not support the defendant's argument. The Clause protects a member of Congress from being "questioned," and a member is not "questioned" when

he or she chooses to offer rebuttal evidence of legislative acts.

Second, the defendant's argument seems to us contrary to the clear implication of the Supreme Court's holding in *Brewster*. In *Brewster*, as discussed above, the Court held that a member of Congress may be prosecuted for soliciting, agreeing to receive, or receiving a bribe or illegal gratuity in exchange for or because of his or her performance of a legislative act. Such a charge, however, often makes it tactically advantageous for a member to respond with proof of his or her legislative acts. If, for example, the member is charged with accepting a bribe in exchange for supporting certain legislation, and the member ultimately did not support the legislation, the member may well find it tactically beneficial to introduce evidence of his or her lack of support. Or, if the member did ultimately support the legislation, the member may well find it tactically advantageous to offer evidence of his or her assertedly legitimate reasons for doing so. In either event, the charge may be said to have pressured the member into responding with proof of legislative acts. Thus, implicit in the type of bribery prosecution sanctioned in *Brewster* is the very sort of

tactical pressure of which the defendant in this case complains.[13]

For these reasons, we agree with the Second Circuit's reasoning and conclusion in *United States v. Myers*, 635 F.2d 932, 942 (2d Cir.), *cert. denied*, 449 U.S. 956 (1980):

> The protection against being "questioned" outside of Congress prevents the use of legislative acts against a Member. It does not prevent him from offering such acts in his own defense, even though he thereby subjects himself to cross-examination.[14]

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[13] The *Brewster* Court was undoubtedly aware that a member of Congress being prosecuted for accepting a bribe or illegal gratuity might find it advantageous to introduce evidence of legislative acts to rebut the government's case against him or her. *See* 408 U.S. at 561 (White, J., dissenting):

> In the trial of a Congressman for making a corrupt promise to vote . . . proof that his vote was in fact contrary to the terms of an alleged bargain will make a strong defense. . . . As a practical matter, to prosecute a Congressman for agreeing to accept money in exchange for a promise to perform a legislative act inherently implicates legislative conduct.

[14] Of course, a Congressman cannot be *forced* to refute charges that directly implicate legitimate legislative acts. *See Gravel v. United States*, 408 U.S. 606, 616 (1972) ("We have no

V.

We turn next to the defendant's and his amici's arguments concerning count V of the indictment, which charges that the defendant violated 18 U.S.C. § 1962(c) by conducting and participating in the affairs of a RICO enterprise through a pattern of racketeering activity.

A. The defendant contends that this charge violates the Speech or Debate Clause because the prosecution, in order to prove the existence of an enterprise within the meaning of the RICO statute, will be compelled to prove that he performed legislative acts. The defendant correctly notes that a RICO enterprise must be something more than simply the pattern of racketeering activity through which the racketeers conducted or participated in its affairs. *See, e.g., United States v. Pelullo,* 964 F.2d 193, 211 (3d Cir.1992); *United States v. Riccobene,* 709 F.2d 214,

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doubt that Senator Gravel may not be made to answer – either in terms of questions or in terms of defending himself from prosecution. . . .").

221-24 (3d Cir.), *cert. denied*, 464 U.S. 849 (1983).[15] Relying on this doctrine, the defendant maintains:

> Since the enterprise encompasses congressional and committee staff members with purely legislative responsibilities, the Department [of Justice] cannot excise this legislative conduct from "The Office of the Honorable Joseph M. McDade" and still meet its burden of proof on the issue of separateness in establishing the RICO enterprise.

Appellant's Br. at 36-37. The defendant further argues that the prosecution will be required to prove how his office "legitimately functioned" and that it will therefore be required to prove that legislative acts were committed. *Id.* at 37.

Contrary to the defendant's arguments, however, we see no basis for concluding that the prosecution will be unable to prove the enterprise charged in count V of

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[15] As we explained in *Pelullo*, 964 F.2d at 211, proof of an enterprise requires evidence: (1) that the enterprise is an ongoing organization with some sort of framework for making or carrying out decisions; (2) that the various associates function as a continuing unit; and (3) that the enterprise be separate and apart from the pattern of activity in which it engages.

the indictment without proving that the defendant or staff members acting under his direction performed legislative acts. For one thing, the prosecution may be able to establish the existence of this enterprise by proof relating to *official* but (for Speech or Debate Clause purposes) non-legislative acts. The Speech or Debate Clause does not immunize every official act performed by a member of Congress. *See Doe v. McMillan*, 412 U.S. 306, 313 (1973). Rather, as the Supreme Court has stated:

> The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

Gravel v. United States, 408 U.S. 606, 625, (1972). *See also Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 504 (1975); *McMillan*, 412 U.S. at 314. Accordingly, the Clause does not shield "a wide range of legitimate 'errands' performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing

so-called 'news letters' to constituents, news releases, and speeches delivered outside the Congress." *Brewster*, 408 U.S. at 512. *See also Hutchinson v. Proxmire*, 443 U.S. 111 (1979) (issuance of press releases and newsletters not protected); *McMillan*, 412 U.S. 306 (public dissemination of a congressional report not protected); *Gravel v. United States*, 408 U.S. 606 (private republication of documents introduced and made public at a congressional hearing not protected). Thus, the prosecution in this case may be able to prove the existence of the enterprise charged in count V based on evidence relating to some of these or other similar unprotected activities.

In addition, the prosecution may be able to prove the existence of the enterprise in question by evidence relating to unofficial or ultra vires conduct that is separate from the pattern of racketeering activity. What the prosecution will ultimately attempt to show and what it will be able to show in this regard are not dispositive for present purposes. Because it is clearly possible for the prosecution to prove the separate existence of the enterprise charged in count V without violating the Speech or Debate Clause, we must

affirm the district court's decision not to dismiss that count.[16]

B. The defendant's amici, the Speaker and Bipartisan Leadership Group of the United States House of Representatives, advance a different Speech or Debate Clause argument pertaining to the RICO count. The amici begin by contending that the Speech or Debate Clause prohibits a RICO charge that defines the "enterprise" as Congress or a congressional committee. This rule, the amici maintain, is needed to protect Congress and its committees from Executive Branch intimidation or interference. The amici then argue that this prohibition cannot be circumvented by defining a RICO enterprise as an association-in-fact consisting of all of the members and staff of Congress or of a particular congressional committee.

We are skeptical about the validity of these arguments and, in any event, we do not believe that they are applicable here. First, we are doubtful that an indictment alleging that a congressional committee

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[16] We also disagree with the defendant's argument that the Speech or Debate Clause requires excision from the indictment of all RICO predicate offenses that are based on the illegal receipt of gratuities and extortion. The defendant contends that these predicates improperly rely on his status as a committee member, but this contention is merely a variant of the argument that we discussed and rejected in Part III of this opinion.

constitutes an "enterprise" under 18 U.S.C. § 1962(c) would intimidate or interfere with Congress, as the amici suggest. Such a charge would not accuse the committee, as a formal entity, with wrongdoing; nor would it seek the imposition of any sanctions on the committee as such. Rather, such a charge would imply that, in the view of the grand jury, the committee had been exploited by the individuals charged as defendants. A major purpose of the RICO statute was to protect legitimate enterprises by attacking and removing those who had infiltrated them for unlawful purposes. *See Russello v. United States,* 464 U.S. 16, 28 (1983); *United States v. Turkette,* 452 U.S. 576, 591 & n.13 (1981). Consequently, an indictment defining a congressional committee as the "enterprise" under 18 U.S.C. § 1962(c) would suggest that the committee as a formal entity was a victim, not a wrongdoer.

Second, assuming for the sake of argument that the Speech or Debate Clause prohibits an indictment under 18 U.S.C. § 1962(c) that defines a congressional committee as the enterprise, we fail to see why the RICO charge in this case would have to be dismissed, since it does not define the enterprise as a committee. The amici contend that prosecutors should not be able to accomplish indirectly what they cannot accomplish directly and that therefore they should be precluded from proceeding under an indictment that charges all of the members of a committee and its staff as an

association-in-fact RICO enterprise. This argument, however, is both inapplicable to this case and questionable on its own terms. The RICO count in this case does not allege an enterprise consisting of all of the members and/or staff of the committees to which the defendant belonged. Instead, as we have noted, that count defines the "enterprise" as consisting of only one committee member (the defendant) and only those staff members who worked under his direction.

Moreover, even if the amici's argument were applicable to this case, we would find it questionable. Suppose that all of the members of a committee and its staff formed an association that satisfied all of the requirements of a RICO enterprise and that the committee members and staff engaged in a pattern of soliciting and receiving bribes and illegal gratuities from a large number of persons or entities interested in the outcome of the committee's work. The Speech or Debate Clause would not prevent all of the committee and staff members from being individually prosecuted on substantive charges of taking bribes and illegal gratuities. *See Brewster*, 408 U.S. 501. Nor would the Clause prevent all of the committee and staff members from being prosecuted for conspiring to take illegal bribes or gratuities. *See Helstoski I*, 576 F.2d at 517. We therefore find it difficult to understand why the Speech or Debate Clause would protect these same individuals from being prosecuted under 18 U.S.C. § 1962(c) for

participating in a RICO scheme based on essentially the same underlying conduct. If the substantive and conspiracy charges mentioned above would not unconstitutionally intimidate or interfere with Congress, it is unclear why a RICO charge based on essentially the same underlying conduct would do so.

C. In addition to these arguments based on the Speech or Debate Clause, the amici also offer an argument grounded on RICO itself. Specifically, the amici maintain that Congress did not intend to include itself or its committees within the meaning of the term "enterprise" as it is used in the RICO statute and that Count V therefore does not state a RICO offense. We hold, however, that our limited appellate jurisdiction under the collateral order doctrine does not encompass this argument. Since this argument is not based on the Speech or Debate Clause, it does not fall within the reasoning of *Helstoski v. Meanor,* 442 U.S. 500. Rather, it is governed by the holding in *Abney,* 431 U.S. at 663, that "an order denying a motion to dismiss an indictment for failure to state an offense" is not appealable pursuant to the collateral order doctrine. Thus, we lack jurisdiction to review this question at this time.

VI.

We now come to the defendant's final group of arguments. The defendant contends that the district court should have dismissed the indictment because it "runs afoul of the Speech or Debate Clause, both on its face and by being vague as to whether various allegations involve legislative or purely political acts." Appellant's Br. at 25. Relying on *Government of the Virgin Islands v. Lee,* 775 F.2d 514 (3d Cir.1985), *In re Grand Jury Investigation (Eilberg),* 587 F.2d 589 (3d Cir.1978), and precedent concerning double jeopardy claims,[17] the defendant then argues that the district court at least should have ordered the government to provide a bill of particulars or should have conducted a pretrial proceeding to explore Speech or Debate Clause issues. At one point, the defendant suggests that the government should have been compelled before trial to "provide proof, subject to appellate review, that the prosecution does not violate the Clause." *Id.* at 26. Later, however, he states that the Speech or Debate Clause did not require pretrial rulings on all of the evidentiary questions that might develop during the trial but instead "necessitate[d] an inquiry limited to the allegations implicating the Speech or Debate Clause." *Id.* at 30 n.15. "[T]he precise scope of that inquiry," he adds, "depend[s] on the indictment." *Id.*

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[17] *See United States v. Inmon,* 568 F.2d 326 (3d Cir.1977).

As we understand the defendant's arguments, they pose the following four questions. First, was the district court required to dismiss the entire indictment or any part of the indictment for lack of the specificity allegedly required by the Speech or Debate Clause? Second, was the district court required to dismiss any charge in the indictment (or to conduct a hearing in order to determine whether to dismiss any charge in the indictment) on the ground that it is based on conduct that is protected by the Speech or Debate Clause? Third, even if no charge had to be dismissed, was the district court required to strike any allegations in the indictment (or to conduct a hearing in order to determine whether to strike any allegations in the indictment) on the ground that they concern legislative acts protected by the Speech or Debate Clause? And, fourth, was the district court required to make a pretrial ruling barring the prosecution from proving these allegations at trial? We will discuss each of these questions in turn.

A. *Was the district court required to dismiss the entire indictment or any part of the indictment for lack of the specificity allegedly required by the Speech or Debate Clause?* We do not believe that the Speech or Debate Clause required dismissal of all or any part of the indictment for vagueness. The defendant cites no authority for the proposition that the Clause imposes pleading requirements, and we do not think that the

Clause imposes such requirements per se. We agree that the prosecution, in a case with potential Speech or Debate Clause issues, must provide sufficient notice of the nature of the charges so that a motion for dismissal on Speech or Debate Clause grounds can be adequately litigated and decided. However, we see no basis for concluding that the Speech or Debate Clause requires that this notice be furnished in the indictment itself. Furthermore, the indictment in this case is replete with factual details, and as noted below,[18] the defendant has specifically cited only a few allegations that he claims are impermissibly vague. Thus, we reject the defendant's argument that the indictment in this case is too vague to satisfy the Speech or Debate Clause.[19]

B. *Was the district court required to dismiss any charge in the indictment (or to conduct a hearing in order to determine whether to dismiss any charge in the indictment) on the ground that it is based on conduct that is protected by the Speech or Debate Clause?* The defendant cites two categories of allegations in the

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[18] *See infra,* pp. A-40, A-43 to A-44.

[19] We clearly lack jurisdiction at this time to consider whether, pursuant to provisions of law other than the Speech or Debate Clause, the indictment is sufficient or the government provided sufficient notice of the charges against the defendant. Consequently, our opinion should not be interpreted as expressing any view on such questions.

indictment that he claims are ambiguous and therefore necessitated evidentiary exploration in order to determine whether they violate the Speech or Debate Clause: allegations concerning his travels and allegations concerning his contacts with the Executive Branch. We agree with the defendant that if a district court lacks sufficient factual information to determine whether dismissal of a particular charge in an indictment is required under the Speech and Debate Clause, the court must obtain that information before trial by conducting a hearing or by some other means. *See Lee*, 775 F.2d at 524-25; *In re Grand Jury Investigation*, 587 F.2d at 597. In this case, however, no hearing or other procedure was needed for this purpose with respect to either of the categories of allegations that the defendant cites.

1. *Travel.* Travel is an essential element of some of the offenses charged in the indictment,[20] but we fully agree with the Second Circuit's conclusion in *United States v. Biaggi*, 853 F.2d 89, 104 (2d Cir.1988), *cert. denied*, 489 U.S. 1052 (1989), that travel by a member of Congress to or from a location where the

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[20] For example, Counts II and IV charge the defendant with violating 18 U.S.C. § 201(c)(1)(B) by, among other things, actually receiving a thing of value for and because of official acts. The thing of value alleged in these counts is travel *or a payment for travel. If travel or a payment for travel* were protected by the Speech or Debate Clause, and could therefore not be proven, receipt of the specified thing of value could not be established.

member performs legislative acts is not itself protected by the Speech or Debate Clause.

The text of Article I, § 6 of the Constitution supports this view. In addition to the Speech or Debate Clause, this provision contains the clause providing that "Senators and Representatives . . . shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and *in going to and returning from* the same . . ." (emphasis added). Since this clause specifically addresses the protection enjoyed by members "in going to and returning from" the site of legislative activity and limits that protection to a qualified freedom from civil[21] arrest, it seems most unlikely that the very next clause, which is couched in terms of "Speech or Debate in either House," was meant to confer additional protection with respect to such travel.

Supreme Court precedent fortifies this conclusion. As observed earlier, the Court has held that the Speech or Debate Clause protects matters other than actual speech or debate only if they are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the

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[21] *See Gravel*, 408 U.S. at 614.

consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel*, 408 U.S. at 625. Travel to and from the Capitol or any other site where legislative acts are performed, although a necessary precondition for the performance of these acts, is not an integral part of Congress's deliberative and communicative processes. If it were, then the Speech or Debate Clause would produce seemingly absurd results, such as immunizing a member of Congress from being prosecuted or sued for striking a pedestrian with his or her car while racing to the Capitol. As the Second Circuit has aptly stated:

> [U]nless the focus of the legislation itself is transportation, the mere transport of oneself from one place to another is simply not "an integral part of the deliberative and communicative processes by which members participate in committee and House proceedings." We conclude that the Speech or Debate Clause does not immunize a congressman from prosecution for interstate travel in furtherance of receipt of an unlawful gratuity, any more than it would immunize him for a charge of theft of services if he traveled as a stowaway.

Biaggi, 853 F.2d at 104 (citations omitted).

In this case, the defendant's briefs, in challenging the travel allegations in the indictment, do not claim or offer to prove anything more than that the travel in question was undertaken so that he could perform what he claims were legislative acts upon arriving at one of his final or intermediate destinations. Therefore, the defendant's briefs do not claim or offer to prove facts that would be sufficient to establish that the travel at issue is protected by the Speech or Debate Clause, and we consequently have no basis for concluding that the district court was required to dismiss the charges based on the defendant's travel or to conduct a pretrial proceeding or otherwise delve further into the indictment's travel allegations.

2. *Executive Branch Contacts.* The Supreme Court has repeatedly stated that the Speech or Debate Clause does not apply to efforts by members of Congress to influence the Executive Branch. *See, e.g.*, *McMillan*, 412 U.S. at 313; *Gravel*, 408 U.S. at 625; *Brewster*, 408 U.S. at 512; *Johnson*, 383 U.S. at 172. Nevertheless, the defendant and his amici argue that these statements do not apply to legislative "oversight."

Neither the defendant nor his amici have provided a definition of "oversight," but the term, as usually employed, appears to have a broad meaning. For example, a recent study explains that the term is used to refer to "a variety of techniques" for

monitoring components of the Executive Branch, ranging from "formal procedures or processes, such as committee hearings" to "informal" techniques, "such as communication with agency personnel by staff or committee members" and even "casework" and program evaluations performed by private individuals or groups. Joel D. Aberbach, *Keeping a Watchful Eye -- The Politics of Congressional Oversight* 130, 132 (1990). Activities at one end of this spectrum, such as committee hearings, are clearly protected by the Speech or Debate Clause. *See Eastland*, 421 U.S. at 504-06. Activities at the other end of the spectrum, such as routine casework for constituents, are just as clearly not protected. *See Brewster*, 408 U.S. at 512. Whether the Speech or Debate Clause shields forms of "oversight" falling between these extremes – for example, letters or other informal communications to Executive Branch officials from committee chairmen, ranking committee members, or other committee members – is less clear. *See, e.g., Hutchinson,* 443 U.S. at 121 n.10; *Chastain v. Sundquist,* 833 F.2d 311, 313-15 (D.C.Cir.1987), *cert. denied,* 487 U.S. 1240 (1988); *In re Grand Jury Investigation,* 587 F.2d at 594-95; *Hutchinson v. Proxmire,* 579 F.2d 1027, 1031-32 (7th Cir.1978), *rev'd in part on other grounds,* 443 U.S. 111 (1979); *McSurely v. McClellan,* 521 F.2d 1024, 1036-40 (D.C.Cir.1975).

In this case, the defendant's briefs mention only two specific allegations in the indictment – overt act 16

in count I and overt act 17 in count III – that concern the defendant's contact with Executive Branch officials[22] and that are claimed to involve protected "oversight,"[23] and we therefore limit our inquiry to consideration of these overt acts. Overt act 16 in count I alleges that the defendant caused a letter to be sent to the Secretary of the Navy warning that the Navy's decision to issue a "stop work" order with respect to UCC's work on a Navy project, the "Sea Shed" program, would be viewed by the defendant with "extreme gravity." Overt act 17 in count III alleges that the defendant wrote to the Secretary of the Army requesting that the Army delay in making a final decision on a possible "second-source" contract for the SINCGARS program. Both the "Sea Shed" program and the SINCGARS program fell within the jurisdiction of committees on which the defendant sat, and while the "Sea Shed" letter openly lobbies on behalf of UCC, a business in the defendant's district, the SINCGARS

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[22] *See* Appellant's Br. at 32-33; Appellant's Reply Br. at 21.

[23] The defendant also mentioned his efforts to raise funds for a concert held at the Capitol on July 4, 1983. Appellant's Br. at 33 n.18. Raising money for this concert is mentioned in predicate act 1 of count V, which alleges that the defendant extorted from UCC a $10,000 contribution for this concert. This is not an allegation of contact with the Executive Branch. Moreover, we do not see how this alleged conduct can possibly be viewed as "oversight" or as protected under the Speech or Debate Clause.

letter does not explicitly refer to any particular business seeking a "second-source" contract. Instead, the SINCGARS letter discusses the broader policy question whether the Army should award such a contract before the General Accounting Office has completed its review of the "second-source" selection process. Thus, whatever the defendant's motivation in writing the SINCGARS letter, the letter appears on its face to fall into the above-described middle category of oversight activities.

Even if we were to hold, however, that both of the overt acts in question are invalid, no charge in the indictment would have to be dismissed. Both counts I and III, which charge conspiracies under 18 U.S.C. § 371, allege numerous other overt acts, and an indictment under 18 U.S.C. § 371 need only allege one overt act. *See, e.g., Fiswick v. United States,* 329 U.S. 211, 216 (1946); *United States v. Kapp,* 781 F.2d 1008, 1012 (3d Cir.), *cert. denied,* 475 U.S. 1024 (1986). Thus, irrespective of the validity of the two overt acts in question, it is apparent that the district court was not required to dismiss (or to conduct a hearing in order to determine whether to dismiss) either count I or count III.

C. *Even if no charge had to be dismissed, was the district court required to strike any allegations in the indictment (or to conduct a hearing in order to determine whether to strike any allegations in the indictment) on the*

ground that they concern legislative acts protected by the Speech or Debate Clause? Since we have held that the defendant's arguments regarding travel lack merit under the Speech or Debate Clause, the remaining allegations that we must now address are those concerning the defendant's contacts with the Executive Branch. But before considering whether the district court was required to strike these allegations or to conduct a hearing to determine whether they should be stricken, we must decide whether we have jurisdiction at this time to decide these questions. Although the parties and the amici in this case seem to assume that any ruling under the Speech or Debate Clause is appealable under the collateral order doctrine, neither the Supreme Court nor this court has so held. In *Helstoski v. Meanor,* 442 U.S. at 508, the Supreme Court held only that the collateral order doctrine authorizes a pretrial appeal of an order refusing to dismiss criminal charges under the Speech or Debate Clause. Therefore, we must decide whether to go beyond *Helstoski v. Meanor* and hold that the collateral order doctrine applies to a pretrial refusal to strike overt acts that are not essential to the offense

charged.[24] We conclude that it does not apply to this category of claims.

The question whether the two overt acts should have been stricken (divorced from the question whether proof of those acts at trial should have been barred) does not satisfy the requirement that the right at issue in a collateral order appeal must be jurisprudentially "important," *i.e.*, "sufficiently important to overcome the policies militating against interlocutory appeals." *Santtini*, 963 F.2d at 592 (quoting *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 502 (1989) (Scalia, J., concurring)). *See also Digital Equipment Corp.*, 62 U.S.L.W. at 4461-62; *Nemours Found. v. Manganaro Corp.*, 878 F.2d 98, 100 (3d Cir.1989); *Praxis Properties*, 947 F.2d at 56. As we have noted, striking these overt acts would not require the dismissal of any charge in the indictment. In addition, neither retention of these overt acts in the indictment nor their removal would in itself have any evidentiary significance. As juries are

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[24] Although we have found no indication that the defendant asked the district court for this precise form of relief, we will assume, under the particular circumstances here, that such a request was subsumed within the defendant's request for dismissal of the indictment and, similarly, that the district court's refusal to dismiss the indictment constituted a refusal to strike these two overt acts.

customarily instructed, the indictment is not evidence.[25] Retention of these overt acts in the indictment does not necessarily mean that the prosecution will attempt or will be permitted to prove them at trial. Similarly, the absence of these overt acts from the indictment would not in itself preclude the prosecution from proving them or from relying on such proof to satisfy the overt act requirement contained in 18 U.S.C. § 371.[26] Accordingly, the asserted right to have the two overt acts stricken before trial (or to have a hearing on that question), far from being important, appears to have little significance.[27]

D. *Was the district court required to make a pretrial ruling barring the prosecution from proving these*

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[25] *See, e.g., Fetters v. United States ex rel. Cunningham,* 283 U.S. 638, 641-42 (1931); *United States v. DePeri,* 778 F.2d 963, 979 (3d Cir.1985), *cert. denied,* 476 U.S. 1159 (1986).

[26] *See, e.g., United States v. Adamo,* 534 F.2d 31, 38 (3d Cir.), *cert. denied,* 429 U.S. 841 (1976); *United States v. United States Gypsum Co.,* 600 F.2d 414, 419 (3d Cir.), *cert. denied,* 444 U.S. 884 (1979).

[27] Under some circumstances, language in an indictment, even though lacking any legal effect, may be prejudicial. *See, e.g., United States v. Vastola,* 899 F.2d 211, 231-32 (3d Cir.), *vacated,* 497 U.S. 1001 (1990) (*remanded for reconsideration in light of United States v. Rios,* 495 U.S. 257 (1990)). The language of the overt acts at issue in this case, however, clearly was not so prejudicial that it should have been stricken from the indictment.

allegations at trial? We need not decide if the question whether the district court should have barred proof of these acts at trial is jurisprudentially "important" because this question fails to satisfy other requirements of the collateral order doctrine. For one thing, the district court did not "conclusively" rule on this question; rather, the court deferred any ruling on such evidentiary questions until trial. *See* 827 F. Supp. at 1170. Furthermore, it is settled that a ruling on the admissibility of evidence at a criminal trial is not completely separate from the merits of the case. *See DiBella,* 369 U.S. at 131-32; *Cogen v. United States,* 278 U.S. 221, 227-28 (1929); *United States v. Johnson,* 690 F.2d 60, 62-63 (3d Cir.1982), *cert. denied,* 459 U.S. 1214 (1983). Instead, such a ruling is "but a step in the criminal case preliminary to the trial thereof," *Cogen,* 278 U.S. at 227, and may not be reviewed before trial under 28 U.S.C. § 1291.[28] Accordingly, we cannot decide at this time whether the admission of evidence of these acts would violate the Speech or Debate Clause.[29]

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[28] Thus, to the extent that the defendant seeks review of other purely evidentiary questions, *e.g.*, whether the district court was correct in ruling that general evidence about how Congress works would not violate the Speech or Debate Clause, *see* Appellant's Br. at 16, we must likewise refuse review at this time.

[29] The question discussed above (whether the district court should have barred proof of these acts at trial) may be viewed as conceptually distinct from the question whether the district

United States v. Carney, 665 F.2d 1064 (D.C.Cir.), *cert. denied*, 454 U.S. 1081 (1981). *See also United States v. Levine*, 658 F.2d 113, 125 n.22 (3d Cir.1981) (collateral estoppel); *United States v. Mock*, 604 F.2d 336, 337-41 (5th Cir.1979) (same).

VII.

For the reasons explained above, we affirm the district court's refusal to dismiss any of the charges in the indictment. To the extent that the defendant challenges the district court's other rulings, we lack jurisdiction to hear these challenges at this time, and his appeal is therefore dismissed.

SCIRICA, *Circuit Judge*, concurring and dissenting in part.

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court should have ruled one way or the other on whether this evidence could be admitted at trial. Under the circumstances here, however, the timing of the district court's ruling on these evidentiary questions is not "jurisprudentially important." This timing did not affect the defendant's appellate rights, cf. Fed.R.Cr.P. 12(f), because even if the district court had denied the defendant's pretrial request for suppression of this evidence he could not have appealed that decision for the reasons explained above. Moreover, it is not apparent from the record of this case that the district court's decision not to issue a pretrial ruling on the relatively narrow evidentiary questions presented by the defendant prejudiced him in any other way.

I would hold that true legislative oversight falls within the protection of the Speech or Debate Clause. I write separately only because I believe we have jurisdiction to decide whether overt acts in the indictment violate the Speech or Debate Clause and that one of the overt acts here may be privileged. In all other respects I fully join the majority opinion.

I.

The majority holds that jurisdiction to determine whether overt acts challenged on Speech or Debate grounds should be stricken "does not satisfy the requirement that the right at issue in a collateral order appeal be jurisprudentially 'important,'" Maj. Op. at 31, because "striking these overt acts would not require the dismissal of any charge in the indictment."[1] *Id.* at 31. I respectfully disagree.

The Supreme Court recently stated, "[w]hen a policy is embodied in a constitutional or statutory provision entitling a party to immunity from suit . . . there is little room for the judiciary to gainsay its 'importance.'" *Digital Equip. Corp. v. Desktop Direct, Inc.*, 62 U.S.L.W. 4457, 4461 U.S. June 8, (1994). Our

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[1] As the majority notes, McDade's briefs refer to only two overt acts in the indictment involving contact with the executive branch. Maj. Op. at A-44.

cases indicate an issue is jurisprudentially important under the collateral order doctrine if it is "serious and unsettled." *United States v. Santtini*, 963 F.2d 585, 592 (3d Cir.1992); *Praxis Properties, Inc. v. Colonial Sav. Bank, S.L.A.*, 947 F.2d 49, 56 (3d Cir.1991). Both tests appear to be satisfied here. Grounded in our concept of separation of powers, *see Helstoski v. Meanor*, 442 U.S. 500, 506 (1979) ("guarantees of that Clause are vitally important to our system of government. . . ."), the Speech or Debate Clause was written into the Constitution "to protect the integrity of the legislative process by insuring the independence of individual legislators." *United States v. Brewster*, 408 U.S. 501, 507 (1972). Since the privilege is part of the "'practical security' for ensuring the independence of the legislature," *United States v. Johnson*, 383 U.S. 169, 179 (1966), determining its boundaries requires us to examine the relationship between the three branches of government. It is, therefore, a serious matter and important enough to overcome judicial policies militating against interlocutory appeals.[2]

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[2] The Speech or Debate Clause protects our constitutional separation of powers. *See Brewster*, 408 U.S. at 507; *see also* Robert J. Reinstein and Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 Harv. L. Rev. 1113, 1139 (1973) (Framers "recognized the unique and vital role of this privilege in the system of separate powers."). Policies militating against interlocutory appeal include restraining appellate intervention in tentative decisions and

The issue is also unsettled. Neither party has identified a case where a court has ruled on whether the Speech or Debate privilege applies to oversight. Although the Supreme Court has held that certain contacts between Members of Congress and executive agencies are not immunized by the Speech or Debate Clause, *see Brewster,* 408 U.S. at 512; *Gravel v. United States,* 408 U.S. 606, 625 (1972); *Johnson,* 383 U.S. at 172, it has not held that all contacts with executive agencies are outside the privilege. As the majority has noted, the Court has drawn a distinction between legislative and political acts, in which the former are protected while the latter are not. Thus, in *Brewster,* after the Court defined legislative acts as those things "generally done in Congress in relation to the business before it," 408 U.S. at 512, it stated that many contacts between Members and executive agencies are not protected because "they are political in nature rather than legislative. . . ." *Id.* Therefore, the second part of the "jurisprudentially important" test is satisfied. *Cf. Santtini,* 963 F.2d at 592 (case of first impression is jurisprudentially important).

"combin[ing] in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results." *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541, 546 (1949).

I agree that striking either overt act would not result in dismissing any charge in the indictment, and I recognize the government may decide not to introduce evidence of the challenged overt acts at trial, obviating the need to reach this issue.[3] But the Supreme Court has held a Member cannot be forced to defend against charges which implicate legitimate legislative activity. *Gravel*, 408 U.S. at 616, ; *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (per curiam). Therefore, if the indictment recites an overt act that colorably violates the Clause, it would seem a Member of Congress is entitled to a ruling pre-trial even though striking the overt act would not result in dismissing any charge in the indictment. *See Helstoski*, 442 U.S. at 508 ("[I]f a Member 'is to avoid exposure to [being questioned for acts done in either House] and thereby enjoy the full protection of the Clause, his . . . challenge to the indictment must be reviewable before . . . exposure [to trial] occurs.'") (alterations in original) (quoting *Abney v. United States*, 431 U.S. 651, 662 (1977)).[4]

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[3] Indeed, the government appears to concede this possibility. *See* Government Brief at 23 ("[E]ven if some of McDade's interactions with the executive and military had a partial oversight component such evidence will not be presented by the government.").

[4] Rather than prejudice, see Maj. Op. at A-49 n.27, the issue is constitutional privilege. Thus, where a colorable claim is

II.

With respect to the substance of McDade's challenge, it appears one of the overt acts may refer to protected activity, and could be stricken from the indictment. The Speech or Debate Clause prevents a Member from being questioned outside of Congress with respect to any legislative activity. Legislative activity comprises any act that is "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel*, 408 U.S. at 625. True legislative oversight fits within this definition.

Generally speaking, oversight is the way Congress evaluates legislation, and in the appropriate manner, monitors the operations of executive departments and agencies. Properly done, oversight is part of our system of checks and balances. The term covers a range of formal and informal activities, of which some may be privileged. See Maj. Op. at A-43 to A-44. The key to identifying privileged oversight lies in

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made that an overt act in an indictment refers to privileged activity, inclusion of other, unprotected acts should not cure the infringement.

the political-legislative distinction. *Cf. Brewster*, 408 U.S. at 512; *Gravel*, 408 U.S. at 618 ("the Court has sought to implement its fundamental purpose of freeing the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator.").

At the extremes the cases will be clear. *Compare Gravel*, 408 U.S. at 616 ("We have no doubt that Senator Gravel may not be made to answer . . . for the events that occurred at the subcommittee meeting.") *with Johnson*, 383 U.S. at 172 ("No argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process."). For example, constituent casework including attempts to win government contracts would not be privileged, *see Brewster*, 408 U.S. at 512, while contacts made as part of a congressional investigation might be, *see, e.g., Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 504 (1975) ("The power to investigate and to do so through compulsory process plainly falls within [the legitimate legislative sphere].").

Only one of the challenged overt acts here colorably refers to Speech or Debate privileged material. Count III, overt Act 17 states "On or about June 7,

1988, defendant MCDADE, wrote to the Secretary of the Army requesting that the Army delay in making a final decision on a possible 'second source' for the SINCGARS program." That letter states, in part:

> [The Subcommittee] believed the actual source selection process should result in a selection which minimized technological and financial risk, while emphasizing lower life cycle costs, interoperability, and the benefits of eventual competition. In order to insure source selection in conformance with these criteria, the conferees on the Fiscal Year 1988 Defense Appropriations Act directed the GAO to monitor the entire second source selection process and report its findings to the Committees on Appropriations.
>
> The committee has received interim reports from GAO, and the Army has completed its source selection. However, the GAO's final report will not be completed until July 15th. In the meantime, I am advised the Army intends to award the second source contract by June 10th, well in advance of the final GAO report. While I have no knowledge of any findings by GAO which may cast doubt on the source selection, I believe a contract award in advance of GAO's final review and assessment is ill-timed and ill-advised.

The government contends the letter is evidence of McDade's attempt to steer the award of the SINCGARS contract to Grumman corporation, who allegedly was paying McDade bribes and gratuities. As the ranking minority member on the subcommittee charged with monitoring the SINCGARS program, McDade would likely be involved with reviewing the Army's contract award.

McDade has made a colorable claim that the letter referred to in overt act 17 is legitimate oversight. If, as the government argues, McDade was involved in a conspiracy to influence the Army's choice of suppliers, the government would still have the opportunity to prove its case, but would have to do so without the benefit of privileged material. *Cf. Johnson*, 383 U.S. at 185 ("With all references to this aspect of the conspiracy eliminated, we think the Government should not be precluded from a new trial on this count, thus wholly purged of elements offensive to the Speech or Debate Clause.").

By contrast, the government alleges in count I, overt act 16 that "McDade caused a letter to be directed to the Secretary of the Navy warning that the Navy's decision to issue a 'stop work' order on [United Chem Con's] Sea Shed production would be viewed by McDade with 'extreme gravity.'" McDade states in that letter:

> On the topic of Sea Sheds, my staff is informed by the Director of Strategic Sealift that Sea Sheds produced at the Renovo, Pennsylvania plant in my District were apparently not in dimensional conformance with applicable specifications. The Director advised that in a parallel situation he was obliged to issue a stop work order.
>
> I view the issue of a stop order against the Renovo plant with extreme gravity since Sea Sheds production is the town's single industry. . . . I have asked Ms. Deck [of my Defense committee staff] to ascertain why this highly qualified producer should suddenly be delivering inacceptable [sic] items and report to me on the probable cause.

This letter does not constitute legislative activity, but rather represents unprivileged constituent service. *See Brewster*, 408 U.S. at 512, (unprotected activities include errands performed for constituents).

III.

I recognize that in some cases it may be difficult to distinguish true oversight from lobbying, and that some future legislator might attempt to shield illegal activity with the subterfuge of oversight. But "the risk of such abuse was 'the conscious choice of the Framers' buttressed and justified by history." *Eastland*, 421 U.S.

at 510 (quoting *Brewster*, 408 U.S. at 516. I would, therefore, require the district court to determine prior to trial whether the overt acts violate the Clause.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA ACTION	:	CRIMINAL
v.	:	NO. 92-249
JOSEPH M. McDADE, Defendant	:	

OPINION

GAWTHROP, District Judge. May 6, 1993.

Defendant, Joseph M. McDade, a United States Congressman, is charged with accepting illegal gratuities, conspiracy, and racketeering. Currently before the court is a panoply of pretrial motions, including four motions to dismiss various portions of the indictment, a motion to transfer the trial of the case, and some discovery and evidentiary motions, all of which have been exhaustively briefed and argued. Upon the following reasoning, I find that (1) the indictment does not violate the Speech or Debate Clause of the United States Constitution, nor would the trial of this

case be hopelessly doomed to violate that Clause, (2) the indictment adequately alleges all the elements of the crimes charged, (3) venue is proper in the Eastern District of Pennsylvania, (4) the defendant does not have standing, at this stage, to challenge the government's use or introduction of wiretap evidence at trial, and (5) the defendant is not entitled to a bill of particulars or to pretrial disclosure of the government's proof of his connection to the alleged conspiracies.

BACKGROUND

Congressman McDade has represented Pennsylvania's Tenth Congressional District in the United States House of Representatives since 1962. He has been the ranking minority member of the House Small Business Committee since 1982, and he has been the ranking minority member of the House Appropriations Committee, Subcommittee on Defense Appropriations, since 1985.

On May 5, 1992, a grand jury in this district returned a five-count indictment against Mr. McDade charging him with official misconduct from 1983 through 1988. Counts One and Two allege that Mr. McDade accepted cash, travel, vacations, and golf equipment from United Chem Con Corporation ("UCC") in return for his assistance in securing Navy and Postal Service contracts for UCC. Counts Three

and Four allege that Mr. McDade accepted cash, travel, a vacation, and a scholarship for his son from Grumman Corporation, Kane Paper Corporation, and Sperry Corporation in return for his assistance in securing Army and Navy contracts for Grumman and Sperry. Counts One and Three charge Mr. McDade with violating 18 U.S.C. § 371 (conspiracy), and Counts Two and Four charge him with violating 18 U.S.C. § 201(c)(1)(B) (acceptance of an illegal gratuity by a public official).

Count Five charges Mr. McDade with violating 18 U.S.C. § 1962(c) (participation in the affairs of an enterprise through a pattern of racketeering activity). In Count Five, the government alleges that Mr. McDade used his congressional offices and staff as a racketeering enterprise by soliciting and accepting bribes and illegal gratuities and by committing extortion. In addition to incorporating the factual allegations of Counts One through Four, Count Five also alleges that Mr. McDade demanded or accepted cash from UCC to sponsor a concert, that he demanded or accepted travel from Westland Oil Company, that he demanded or accepted a trip to the NCAA Basketball Final Four from Kane Paper, and that he demanded or accepted travel, vacations, and a couch from GSGS & B and GSGS & B, Inc., in return for his assistance in obtaining government contracts for those companies.

Congressman McDade now moves to dismiss the indictment on the grounds that it violates the Speech or Debate Clause of the United States Constitution and that each of its five counts is inadequately pled. Mr. McDade also requests that the court transfer this case to the Middle District of Pennsylvania for trial. In addition, both Mr. McDade and the government have submitted a number of discovery and evidentiary motions. I shall address each of Congressman McDade's motions in this Opinion, and I shall dispose of the government's motion in a separate, contemporaneous Order.

DISCUSSION

THE SPEECH OR DEBATE CLAUSE

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and *for any Speech or Debate in either House, they shall not be questioned in any other Place.*

U.S. Const. art. I, § 6, cl. 1 (emphasis supplied). Congressman McDade moves the court to dismiss the indictment because, he argues, it violates the Speech or Debate Clause.

History and Supreme Court Jurisprudence

The immunization of parliamentary speeches and debates against criminal and civil prosecution is firmly rooted in the Anglo-American system of government. The English Bill of Rights of 1689 represented the climax of centuries of parliamentary struggle against English monarchs, finally establishing that Parliament, not the King or Queen, was supreme. Central to establishing parliamentary supremacy was the elimination of the monarchs' utilization of the criminal and civil law to suppress parliamentary speech and to intimidate legislators. It was not uncommon for the King or Queen to arrest Members of Parliament for advocating positions contrary to the Crown's, and then to imprison those Members in the Tower of London, subject only to appeal to often obsequious royal judges. To put an end to this practice, and to announce its independence from the Crown, Parliament included in the Bill of Rights the following clause: "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be questioned in any court or Place out of Parliament." Bill of Rights, 1689, 1 W. & M., sess. 2, ch. 2, § 9 (Eng.).

The Framers of the United States Constitution took great pains to insure that their document would set up three independent and co-equal branches of government. Given their experience with the English system, our Founding Fathers recognized that the legislature could not hope to be truly independent of the executive unless the legislative acts of its members were immunized from prosecution by the executive. Using the English Bill of Rights as a model, the Framers wrote the Speech or Debate Clause into the United States Constitution.

However, unlike the English system, in which Parliament is supreme, ours is a system of three co-equal branches. As the Supreme Court has observed, "[o]ur speech or debate privilege was designed to preserve legislative independence, not supremacy. Our task, therefore, is to apply the Clause in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government." *United States v. Brewster,* 408 U.S. 501, 508 (1972).

More than two centuries have passed since ratification of the Constitution, and our legislative system has grown increasingly complex. Today, although members of Congress still make speeches and engage in debates on the floors of the House and Senate, most of the grinding of legislative machinery

occurs outside the chambers of the Houses themselves – in congressional offices and committee rooms. Consequently, in an effort to carry forward the Speech or Debate Clause's purpose of immunizing legislative acts against criminal or civil prosecution, the courts have extended the Clause beyond the chambers' doors. For example, the Supreme Court has held that acts undertaken by congressional aides, as agents of members of Congress, which would have been legislative acts had they been performed by the members themselves, are protected by the Speech or Debate Clause. *Gravel v. United States,* 408 U.S. 606 (1972). The Court has also extended the protection of the Clause to committee reports, resolutions, and votes. *Powell v. McCormack,* 395 U.S. 486 (1969). The Clause also protects members of Congress when they are investigating and gathering information about matters which are or may become the subject of legislation. *Eastland v. United States Servicemen's Fund,* 421 U.S. 491.

However, the Supreme Court has also held that the Speech or Debate Clause does not reach attempts by a member of Congress to influence the executive. *United States v. Johnson,* 383 U.S. 169 (1966). In addition, although congressional speeches and votes are protected, a promise to deliver a speech, to vote, or to solicit votes in the future is not protected by the Clause. *United States v. Helstoski,* 442 U.S. 477 (1979).

The taking of a bribe by a member of Congress is likewise not protected. *United States v. Brewster*, 408 U.S. 501 (1972).

In *Brewster*, the Supreme Court held that "the Speech or Debate Clause prohibits inquiry only into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts." *Brewster*, 408 U.S. at 512. The Clause "does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself." *Id.* at 528. The Court held that "political matters," such as "errands" performed for constituents and assistance in securing Government contracts, are not protected by the Clause. *Id.* In summing up its prior jurisprudence, the Court wrote, "the Speech or Debate Clause has been limited to an act which was clearly a part of the legislative process – the *due* functioning of the process." *Id.* at 516 (emphasis in original). Finally, the Court observed that "the privilege is broad enough to insure the historic independence of the Legislative Branch, essential to our separation of powers, but narrow enough to guard against the excesses of those who would corrupt the process by corrupting its Members." *Id.* at 525.

Congressman McDade's Arguments

The common thread running through all of the Supreme Court's opinions, and almost all of the lower court opinions, is that analysis under the Speech or Debate Clause is act-based. The courts have interpreted the Clause as protecting legislative acts only, and most of the cases have turned on the determination of whether a particular action of a member of Congress was or was not a legislative act. The question Congressman McDade now raises is whether the Clause also protects legislative status, and in particular, committee status.

The indictment itself includes references to Mr. McDade's committee positions, and the government admits that it intends to prove that Mr. McDade was able to use his status as the ranking minority member on two House committees[1] to his personal advantage. The government intends to show that Mr. McDade's committee status made him a more attractive target for potential bribers, and that the alleged gratuity-givers and bribers in this case viewed Mr. McDade not as just another member of Congress, but as a very powerful

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[1] I realize, of course, that the two "committees" to which I refer are actually one committee and one subcommittee. However, for reasons of grammatical simplicity, I shall refer to both as "committees."

member of Congress. Mr. McDade, joined by the Speaker and Bipartisan Leadership Group of the House of Representatives as *amici*, argues that the indictment, by its very mention of Congressman McDade's committee status, violates the Speech or Debate Clause. Further, Mr. McDade and the Leadership Group argue that, in order for the government to show, as it must, that the alleged bribers' and gratuity-givers' beliefs that Mr. McDade was more powerful than an ordinary member of Congress were reasonable, it will have to introduce evidence of the congressional committee process itself, which would violate the Speech or Debate Clause. Alternatively, they argue that in order to show that the beliefs of the alleged bribers and gratuity-givers were not reasonable, Congressman McDade will be forced to introduce evidence about the committee process and his own legislative acts. Thus, the argument goes, Mr. McDade, in order to defend himself, will be impelled to introduce evidence that, if introduced by the government, would violate the Speech or Debate Clause. Since the Speech or Debate Clause is not merely an evidentiary rule, but a Constitutional bar against prosecutions of Members of Congress for their legislative acts, Mr. McDade and the Leadership Group argue that government cannot force Mr. McDade to introduce the protected evidence himself.

Congressman McDade argues that because the Speech or Debate Clause not only grants a privilege to members of Congress, but also acts as the people's safeguard of legislative independence and free discourse, a member of Congress has the right not to have to stand trial at all in defense of his legislative acts, and not to be confronted with the decision of whether to introduce privileged information in his defense. According to Mr. McDade, to prevent him from introducing evidence protected by the Speech or Debate Clause in his defense would be to deprive him of his Sixth Amendment rights to a compulsory process to confront the witnesses against him; to permit the government to forge ahead with a prosecution which would force Mr. McDade to introduce privileged evidence in his defense would violate both Mr. McDade's rights and the people's rights under the Speech or Debate Clause. According to Mr. McDade, trying this case would force him to choose between his Sixth Amendment rights and his and the people's Speech or Debate Clause rights, a choice which would itself violate the Speech or Debate Clause.

This argument does carry some persuasive force, but it is only relevant if the evidence which Mr. McDade professes to be protected by the Speech or Debate Clause – his legislative and committee status and the congressional committee process itself – actually is protected by the Speech or Debate Clause. I thus turn

to the ultimate question on this issue: is legislative status protected by the Speech or Debate Clause?[2]

The Speech or Debate Clause and Committees

As far back as the early Nineteenth Century, courts have applied the Speech or Debate Clause and its state constitutional equivalents to legislative committees. In *Coffin v. Coffin*, 4 Mass. 1 (1803), Chief Justice Parsons of the Supreme Judicial Court of Massachusetts, considering Massachusetts' equivalent of the Speech or Debate Clause, wrote:

> If a member therefore be out of the chamber, sitting in committee, executing the commission of the house, it appears to me that such member is within the reason of the article, and ought to be considered within the privilege. . . . He ought therefore to be protected from civil or criminal prosecutions for every thing

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[2] I note preliminarily that the underlying conduct alleged in the indictment – Congressman McDade's alleged demands or acceptance of gratuities in return for tacit promises to exercise influence, his alleged actions in attempting to influence the executive branch, and his alleged attempts to help obtain government contracts for his benefactors – is all clearly outside the boundaries which the Supreme Court has established for the Speech or Debate Clause. *See, e.g., Helstoski; Brewster; Johnson.*

> said or done by him in the exercise of his functions, as a representative in committee, either in debating, in assenting to, or in draughting a report.

The Supreme Court has joined in Chief Justice Parsons' reasoning that, in order to effectuate the purposes of the Speech or Debate Clause, the Clause should be extended to protect the committee work of members of Congress. *See, e.g., Kilbourn v. Thompson*, 103 U.S. 168 (1881); *Tenney v. Brandhove*, 341 U.S. 367 (1951). In *Gravel v. United States*, 408 U.S. at 606, 624 (1972), the Court held that the conduct of a member of Congress at a committee hearing is protected by the Clause. The court went on to define the types of "legislative acts," including committee acts, which are protected by the Clause: "they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to which the Constitution places within the jurisdiction of either House." *Gravel*, 408 U.S. at 625.

Legislative Status

Congressman McDade and the Leadership Group rely heavily on a recent case from the Eleventh Circuit, *United States v. Swindall*, 971 F.2d 1531 (11th Cir.1992), to support their argument that legislative status is

protected by the Speech or Debate Clause. They argue that because the government has made Mr. McDade's committee status part of the basis of the indictment, an act-based analysis is insufficient.

In *Swindall*, the defendant, a former member of the United States House of Representatives and the House Banking and Judiciary Committees, was convicted of making false material declarations before a grand jury about his knowledge of, and participation in, money laundering activities. In the grand jury phase of the perjury case, the prosecutor questioned the defendant about his knowledge of federal money laundering statutes, prefacing his questions with clauses such as "being a member of the Banking Committee" and "in your capacity on the Banking Committee." *Swindall*, 971 F.2d at 1539-40. Further, at trial, the district court permitted the government to introduce evidence of the defendant's committee memberships, and also permitted the government to argue to the jury the inference that the defendant had knowledge of the money laundering statutes because testimony was taken concerning those statutes during hearings conducted by the committees on which he served.

On appeal, the Eleventh Circuit reversed three counts of the defendant's nine-count conviction. Summarizing its decision, the court said: "First, our

review[3] of Supreme Court precedent convinces us that the privilege protects legislative status as well as legislative acts. Second, here the government's inquiry into Swindall's committee memberships actually amounted to an inquiry into legislative acts." *Id.* at 1543. The court continued, "[i]f the inference is drawn that Swindall acquired knowledge of the statutes *through* his committee memberships, one sees that Swindall could have acquired such knowledge *only* by performing a legislative act such as reading a committee report or talking to a member of his staff." *Id.* (emphasis in original). Close analysis leads me to conclude that the second of the court's alternative holdings, that the government had inquired into the defendant's legislative acts, is the more concise and specific one, and, indeed, the actual basis of the *Swindall* decision. The first holding, that legislative status is protected by the Speech or Debate Clause, is much broader and perhaps unnecessary, given the second holding. That first holding, which expatiates

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[3] This court has also conducted a review of Supreme Court precedent, including all of the cases cited in *Swindall*. This review has found no case holding, or even intimating, that legislative status is protected by the Speech or Debate Clause. I am not convinced, as was the Eleventh Circuit, that the Speech or Debate privilege protects legislative status. Indeed, I am persuaded that the Supreme Court would take the opposite view: that legislative status is *not* protected.

beyond the salient facts of the case and the actual *ratio decidendi*, thus has the ring of dictum.

Although written under the rubric of status, *Swindall* turned on a legislative act – the mental assimilation of information, the thought process involved in a legislator's learning about a particular area of knowledge – in that defendant's case, the techniques, the whys, and the wherefores of money laundering. Although to look at an individual sitting, listening, and absorbing information does not at first blush seem to be an "act," those activities do fall squarely within the definition of "act."[4] Perhaps because of its linguistic first cousin "action," one tends to think of an act in terms of physical movement, the expenditure of physical energy. But using the mind is indeed an act, and when done in the context of one's legislative duties, it is, in fact, a legislative act.

Looking at the evidence presented in *Swindall*, one sees that the government's use of the defendant's legislative status in that case is much different from its proposed use in this one. There, the "inference allowed the jury to infer that Swindall performed legislative *acts*

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[4] For example, the first definition of "act" in the American Heritage Dictionary of the English Language (3d ed. 1992) is "[t]he process of doing or performing something: *the act of thinking.*" (italics in original).

to acquire knowledge about the bills." *Id.* at 1546 (emphasis in original). Here, the government is not attempting to prove, either directly, or by implication, inference, or innuendo, any of Congressman McDade's legislative acts. Rather, his legislative status is introduced for its own sake, to show why the alleged bribers and gratuity-givers might have chosen this particular congressman, by demonstrating that, in the real world, legislators are not fungible, co-equal, peas in congressional pod. Some, because of their status, tend to stand out, making them more appealing prospects for would-be illicit pecuniary importuners. The reason for the second *Swindall* holding – that the government attempted to draw inferences about the defendant's legislative acts by showing his legislative status – is missing in this case. Here, the defendant's status is offered to explain the alleged acts of others.

In *Brewster*, the Supreme Court held that the prosecution cannot inquire into a congressman's legislative acts or motivations. In *Swindall*, the court held that the prosecution could not get around the protections afforded legislative acts and motivations by introducing acts through inferences. Here, the government is not attempting to use Mr. McDade's legislative status to inquire into his legislative acts or motivations; rather, it is relying on his status to show the motivations of the alleged bribers and gratuity-givers.

Congressman McDade's and the Leadership Group's argument thus rests on the first holding in *Swindall*: that legislative status itself is protected by the Speech or Debate Clause. As mentioned above, this broad holding was not necessary to resolve the case before the Eleventh Circuit, but to the extent that that court stated that legislative status *qua* legislative status is protected by the Speech or Debate Clause, I am constrained to respectfully disagree.

The *Swindall* court began its discussion of legislative status by pointing out that the Supreme Court has never explicitly distinguished between "'activity' and 'status.'" *Swindall*, 971 F.2d at 1545. Finding no reason to distinguish between activities and status, the court extracted from the Supreme Court's opinion in *Gravel* three questions which a court should ask when determining whether a matter is protected by the Speech or Debate Clause, and it asked those questions in the context of committee membership: "[D]oes inquiry into a legislator's committee memberships directly impinge on or threaten the legislative process? Does it make legislators accountable before a possibly hostile judiciary? And does it indirectly impair legislative deliberations?" *Swindall*, 971 F.2d at 1545 (citations omitted). The court answered all three questions in the affirmative, thus finding that committee membership is protected by the Speech or Debate Clause. Addressing all three questions together,

the *Swindall* court observed that "levying criminal or civil liability on members of Congress for their knowledge of the contents of the bills considered by their committees threatens or impairs the legislative process." *Id.*

However, this observation does not so much support the proposition that legislative status is protected by the Speech or Debate Clause as it does the proposition that the Clause prevents the government from using the committee membership of a member of Congress to prove his or her knowledge of particular legislation, since the act of acquiring such knowledge is a legislative act. I agree that to allow such behavior by the government would be to allow the government to circumvent the Clause, and would give members of Congress an inappropriate disincentive to acquire direct knowledge of bills pending before their committees. However, I do have trouble with extending that proposition to the conclusion reached by the *Swindall* court that legislative status is always protected. Taken to its next logical step, such reasoning would immunize members of Congress from prosecution for crimes such as bribery, extortion, or the acceptance of illegal gratuities, since official status is an element of those crimes, and since the status of a member of Congress could never be proved because of the Speech or Debate Clause. Neither the Framers, nor presumably the

Congress which drafted the statutes criminalizing such behavior, could have intended such a result.

If the *Swindall* court truly intended to hold that legislative status itself is protected by the Speech or Debate Clause, it made a substantial departure from the Supreme Court's act-based analysis. The Supreme Court's opinions repeatedly refer to "legislative acts," "legislative motivations," and "legislative activities." I do not see how the ordinary meanings of the terms "act," "motivation," and "activity," terms which conjure up the image of some sort of deliberate behavior, could possibly include "status," which is not behavior at all, but merely a condition or circumstance. In *Gravel*, the Court noted that, since *Kilbourn v. Thompson* in 1881, it had recognized that "a Member's *conduct* at committee hearings . . . may not be made the basis for a civil or criminal judgment against a Member." *Gravel*, 408 U.S. at 624 (emphasis supplied). The Court could have, but did not, hold that mere committee membership was protected. The *Swindall* court reasoned that the Supreme Court had never distinguished between "activity" and "membership" because it had never seen a distinction. But it is the opinion of this writer that the Court has never made such a distinction because it has never been asked to make one, and that if it were asked, it would make the crucial distinction.

Given the act-based analysis applied by the Supreme Court in cases such as *Johnson, Gravel, Brewster, and Helstoski,* I believe that the Court would hold that committee membership, and legislative status in general, are not "legislative acts" and that, therefore, legislative status is not protected by the Speech or Debate Clause. Simply put, legislative status and committee membership are not "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel*, 408 U.S. at 625. An indictment's mere mention that the defendant is a high-ranking member of a particular congressional committee, and that those who would corrupt our legislative process might, therefore, view the defendant as a more fertile field in which to seed their money, does not implicate the concerns which the Framers had in mind when drafting the Speech or Debate Clause: separation of powers, the independence of the legislature, and free and open discourse in the Houses of Congress.

In *Government of Virgin Islands v. Lee*, 775 F.2d 514, 522 (3d Cir.1985), the Third Circuit noted that "the cases interpreting the Speech or Debate Clause in which legislative immunity has been triggered have

involved manifestly legislative acts; acts which were so clearly legislative in nature that no further examination had to be made to determine their appropriate status." In that case, the defendant, a Virgin Islands legislator, argued that his conversations and meetings with other officials were protected by the Virgin Islands' version of the Speech or Debate Clause. Applying the same act-based analysis which is applicable to the Speech or Debate Clause of the United States Constitution, the Third Circuit held that "[i]t is the content of Lee's private conversations, and not the mere fact that the conversations took place, that determines whether Lee is entitled to legislative immunity." *Lee*, 775 F.2d at 522. Likewise, here it is the content – the quality and character – of Congressman McDade's acts, and not the mere fact that he is a member of Congress, that determines whether he is entitled to legislative immunity. Indeed, in *Helstoski*, the Supreme Court took the act-based analysis so far as to suggest that specific conversations could be divided into protected and unprotected parts, with the protected parts, "references to legislative acts," excised so that the remainder of the conversations could be admitted into evidence. *Helstoski,* 442 U.S. at 488, n.7. These cases clearly require this court to take an act-based approach when analyzing the Speech or Debate Clause. Having taken such an approach, I find that the Clause does not protect legislative status.

The Congressional and Committee Processes

Congressman McDade and the Leadership Group also advance the argument that the congressional committee process itself is protected by the Speech or Debate Clause. They argue that, in order to show that Mr. McDade wielded extra power because of his status as the ranking minority member on two committees, the government will have to introduce evidence of how congressional committees function, which evidence is protected by the Clause. The government denies that it intends to introduce such evidence, but it also takes issue with the suggestion that that evidence would be protected by the Speech or Debate Clause. Congressman McDade and the Leadership Group further argue that, in his defense, Mr. McDade will have to show that even if the alleged bribers and gratuity-givers believed that he exercised extra influence, those beliefs were unreasonable. To do this, the argument goes, he will have to introduce evidence of the committee process, his roles on the two committees, and his legislative acts, which evidence is protected by the Speech or Debate Clause.

Neither Mr. McDade nor the Leadership Group cites a single case for the proposition that the Speech or Debate Clause prohibits the prosecution or the defense from telling a jury generally about the congressional process. Indeed, in *Swindall*, the district court issued a

pretrial order which allowed the defendant to call Representative Barney Frank to testify about the number of bills before the defendant's committees, and to "argue that it is not reasonable to infer that a congressman is intimately aware of every bill before his committee." *Swindall,* 971 F.2d 1531.[5] Likewise, Representative McDade will be able to call witnesses to testify that his committee positions did not give him extraordinary influence. I see no reason why the Speech or Debate Clause would be violated by allowing the defendant to call a witness to give the jury an introduction to the functioning of congressional committees. The testimony would be along the lines of "this is how Congress works" or "this is how committees work" in general, rather than "this is what Congressman McDade did to get this particular bill passed" or "this is what Congressman McDade often does to influence the votes of other members of Congress." Indeed, if the hearsay hurdle could be overcome, this testimony could just as well be given by a high school civics teacher. General educational or background evidence which the defendant himself presents to the jury to place the government's evidence

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[5] The district court later struck Representative Frank's testimony because it had gone further than the pretrial order had allowed, and because the government threatened to introduce evidence which would violate the Speech or Debate Clause in order to impeach Representative Frank's testimony.

in context cannot be considered to violate the Speech or Debate Clause. It would not be evidence of a legislative act of the defendant, nor would it be introduced "against" him. And Mr. McDade would not be being "questioned in any other Place," to use the words of the Clause, since he would be introducing the evidence himself.

The government is not forcing Congressman McDade to waive his legislative privilege or introduce evidence of his legislative acts in this case. As mentioned above, I do not believe that general background evidence or educational instruction about how congressional committees work is evidence of legislative acts; thus, Mr. McDade can introduce such evidence without having to waive his legislative privilege at all. But if he wishes to go even further, partially waiving his privilege in order to impugn the reasonableness of the other alleged wrongdoers' beliefs by introducing evidence of his legislative acts, he may do so. As Chief Justice Parsons said of the Massachusetts version of the Speech or Debate Clause, "it appears to me that the privilege secured by it is not so much the privilege of the house as an organized body, as of each individual member composing it, who is entitled to this privilege, even against the declared will of the house." *Coffin v. Coffin*, 4 Mass. 1 (1803). Just as a member of Congress is entitled to the privilege against the will of the entire House, he or she would

also seem to be entitled to waive that privilege. Unlike *Swindall*, here the government's case, both in its proffered evidence and argument, does not itself violate the Clause, since it does not invite the jury to consider, or even infer, any legislative acts. Nor does it present the defendant with an irreconcilable dilemma, or even worse, a Hobson's Choice,[6] over whether to waive his legislative privilege.

Evidentiary Hearing

Congressman McDade also argues that, in the event the court does not dismiss the indictment as violative of the Speech or Debate Clause, the court should hold a pretrial evidentiary hearing and require the government to make an offer of proof regarding any allegations as to which there is some question as to the applicability of the Speech or Debate Clause. In support of this position, Mr. McDade points to three documents used by the government at the grand jury proceeding which he claims are protected documents, and he then argues, in effect, that if there are three, then there must be more. Two of the documents relate to travel reimbursement, and the other is a draft memorandum relating to Grumman's attainment of a

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[6] *See, Valenti v. Mitchell*, 790 F.Supp. 534, 548 (E.D.Pa.1992), *aff'd in part*, 962 F.2d 288 (3d Cir.1992).

government contract. Mr. McDade alleges that the third document was directed to the Small Business Committee. I find that the government did not violate the Speech or Debate Clause by introducing these documents at the grand jury proceeding, since none of them relate to legislative acts.

Mr. McDade also argues that the special First Amendment and Speech or Debate Clause concerns which permeate this case should cause the court to hear all of the government's evidence before deciding whether the case should go to trial. Because I do not find that any of the allegations in the indictment carries with it an inevitability, or even a high probability, of violating the Speech or Debate Clause, and because I find no support for the proposition that the government should have to prove its case and proffer all its evidence in the pretrial stage, I shall not order an evidentiary hearing. If questions of admissibility on Speech or Debate grounds arise during trial, Mr. McDade may make objections. Those objections, like all other objections at trial, will be ruled upon consistent with relevant Supreme Court and Third Circuit precedent, and with this Opinion. But I do not find that this indictment raises such grave constitutional concerns as to warrant the taking of such extraordinary

steps as pretrial evidentiary hearings or offers of proof.[7]

Conclusion

The Speech or Debate Clause was not intended to immunize members of Congress from criminal or civil prosecution merely because of their status. The Clause was intended to protect the legislative acts of members of Congress in order to preserve legislative independence and to encourage vigorous legislative debate, not "to make Members of Congress super-citizens, immune from criminal responsibility." *Brewster*, 408 U.S. at 516. Simply being a member of Congress or a committee member is not a legislative act. As the Supreme Court said in *Brewster*, "the shield does not extend beyond what is necessary to preserve the integrity of the legislative process." *Id.* at 517. Extending the protection of the Speech or Debate Clause to legislative status would do nothing to help

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[7] I also hold that Mr. McDade's right under *Helstoski* to an interlocutory appeal of this decision does not carry with it the right to a fully developed factual record. An interlocutory appeal is exactly that – an *interlocutory* appeal. The purpose of the interlocutory appeal is to determine whether Mr. McDade' rights under the Speech or Debate Clause are violated by this indictment. Mr. McDade does not have a pretrial right to have the appellate courts rule on all the evidentiary questions which may arise during trial.

preserve the integrity of the legislative process. If anything, it would adversely affect the public perception of legislative integrity by creating the impression that members of Congress are immune from prosecution merely because they are members of Congress. Surely, the Framers did not intend such a result.

ACCEPTANCE OF ILLEGAL GRATUITIES

Counts Two and Four of the indictment charge Congressman McDade with violating 18 U.S.C. § 201(c)(1)(B), Acceptance of an Illegal Gratuity by a Public Official. That statute holds criminally liable:

> Whoever–(1) otherwise than as provided by law for the proper discharge of official duty– . . . (B) being a public official . . ., directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official.

18 U.S.C. § 201(c). Counts One and Three, the conspiracy counts, and Count Five, the RICO count, include violations of § 201(c)(1)(B) as overt or predicate acts. Mr. McDade moves to dismiss Counts Two and Four in their entirety and those allegations in Counts One, Three, and Five which rely upon his alleged violations of § 201(c)(1)(B), on the ground that the

indictment fails to adequately plead the elements of the offense of accepting illegal gratuities.

Quid Pro Quo

Congressman McDade's first argument is that the indictment fails to plead that he took or promised to take a specific action for each gratuity he allegedly accepted or demanded. The statute itself does not include a quid pro quo requirement, but Mr. McDade asks the court to read such a requirement into the statute, as the Supreme Court did in construing the Hobbs Act in *McCormick v. United States*, 500 U.S. —, 111 S.Ct. 1807, 114 L.Ed.2d 307 (1991). In that case, the Supreme Court held that an elected official could not be prosecuted for extortion for accepting campaign contributions unless "the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." *McCormick*, 114 L.Ed.2d at 326.

Any comparison of *McCormick* to the case at bar must, of course, start with the obvious observation that *McCormick* was a Hobbs Act case, while the current argument is about the gratuities statute. It is thus doubtful whether *McCormick* controls at all.

But even if *McCormick* did apply to the gratuities statute, I do not believe it would require the government to plead a quid pro quo in this case. To

begin with, the *McCormick* court explicitly did not decide whether its reasoning should carry beyond the campaign contributions context. The court said, "we do not decide whether a quid pro quo requirement exists in other contexts, such as when an elected official receives gifts, meals, travel expenses, or other items of value." *Id.* at 326, n.10. The *McCormick* opinion concentrated not on the Hobbs Act itself, but on the character of campaign contributions and the appropriateness of using them in a Hobbs Act indictment, further indicating that the Supreme Court's holding was a very narrow one, applicable only to campaign contributions, which have historically been given special First Amendment status. *See, e.g., Buckley v. Valeo,* 424 U.S.1 (1976). The Court explained that it would make no sense "to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries," since such conduct "has long been thought to be well within the law" and "in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures." *Id.* at 325-26.

Given the language of the Supreme Court's opinion, I find that *McCormick* does not require a quid pro quo for extortion outside the context of campaign

contributions. *Accord, United States v. Davis*, 967 F.2d 516 (11th Cir.1992); *United States v. Torcasio*, 959 F.2d 503 (4th Cir.1992). In this case, the government does not charge Congressman McDade with accepting campaign contributions as gratuities. Rather, the charges are that he accepted gifts such as cash, meals, travel expenses, vacations, golf equipment, and tickets to sporting events, knowing that those gifts were given with the expectation that he would use his Congressional influence in ways favorable to his patrons. This indictment does not threaten to convict Mr. McDade of engaging in legitimate political activity. These alleged acts are certainly not the type of historically elevated First Amendment behavior discussed in *McCormick* and *Buckley*.[8]

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[8] In *Evans v. United States*, 504 U.S. —, 112 S.Ct. 1881, 119 L.Ed.2d 57 (1992), the Supreme Court held that the government satisfied the quid pro quo requirement of *McCormick* where it had alleged that the defendant received a payment in return for a promise to perform specific official acts. *Evans*, 119 L.Ed.2d at 72. The defendant in *Evans* had argued that the district court's jury instructions did not "properly describe the quid pro quo requirement for conviction *if the jury found that the payment was a campaign contribution.*" *Id.* (emphasis supplied). Since *Evans*, like *McCormick*, was a campaign contributions case, it did not go beyond the explicit limitation of the Supreme Court's holding in *McCormick*.

I recognize that Justice Kennedy, in concurrence, and Justices Thomas and Scalia and Chief Justice Rehnquist, in dissent, suggested that the Court had extended the quid pro quo

Obviously, having found no quid pro quo requirement for non-campaign contributions under the Hobbs Act, I also do not find such a requirement under the gratuities statute. The Third Circuit has held:

> We find it unnecessary for the Government to allege in an indictment charging as § 201(g) [reenacted as § 201(c)(1)] offense that a gratuity received by a public official was, in any way, generated by some specific, identifiable act performed or to be performed by the official. A quid pro quo is simply foreign to the elements of a subsection (g) offense. What is proscribed, simply put, is a public official's receipt of a gratuity, to which he was not legally entitled, given to him in the course of his everyday duties, for or because of any official act performed or to be performed by such public official, and he was in a position to use his authority in a manner which could affect the gift-giver.

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requirement to all prosecutions under § 1951 of the Hobbs Act. But since I can find no language in the Opinion of the Court in Evans which explicitly extends the quid pro quo requirement, and since the facts of *Evans* did not require the Court to extend *McCormick*, I respectfully do not interpret the Court's opinion so broadly as did those concurring and dissenting Justices.

United States v. Niederberger, 580 F.2d 63, 68-69 (3d Cir.1978). The indictment in this case charges exactly the kind of behavior described by the *Niederberger* court. *McCormick* does not add an element to the gratuities statute, nor does it reverse Third Circuit precedent on that statute. There is no quid pro quo requirement.

House Ethics Rules

Congressman McDade's next argument is that the indictment fails to allege that his conduct was "otherwise than as provided by law for the proper discharge of official duty." More specifically, he argues that much of the conduct alleged in the indictment complied with the Rules of the House of Representatives, namely Rule XLIII, the Code of Official Conduct, and Rule XLVII, Limitations on Outside Earned Income. The House Leadership Group joins Mr. McDade in arguing that the House Rules should be treated as "laws," at least within the confines of the gratuities statute. The Leadership Group refers to the Ethics in Government Act of 1989, 5 U.S.C. § 7353, which was intended to bar prosecution of government officials under the gratuities statute for their acceptance of gifts of minimal value, where the gifts were authorized by the ethics office of the appropriate branch of government.

The government's response is threefold: first, that the Ethics in Government Act was enacted after all of the conduct alleged in the indictment; second, that none of the conduct alleged in the indictment is validated by the House Ethics Rules or the Ethics in Government Act; and third, that the House Ethics rules are not "laws" since they were not passed by both houses of Congress and signed by the President. As to the government's first response, Mr. McDade and the Leadership Group counter in two ways: (1) when Congress changes its mind as to whether conduct is prosecutable, prior conduct that might have been prosecutable at the time of its commission cannot be prosecuted after Congress has decided that that conduct is no longer prosecutable, under the general criminal law doctrine of abatement, and (2) when enacting the Ethics in Government Act, Congress was merely reaffirming its prior intent that conduct such as this was not to be prosecuted under the gratuities statute.

First, I find it irrefutable that the House Ethics Rules cannot be given the status of "laws." In our country, a bill, in order to become a law, must be passed by both houses of Congress and be signed by the President.[9] The gratuities statute has undergone this

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[9] If the President chooses to veto the bill, his veto may, of course, be overridden by a two-thirds majority vote in both houses of Congress. Alternatively, a bill will become law if the President takes no action for ten days.

rigorous procedure and has become law. The House Ethics Rules have not. The gratuities statute prohibits public officials, including Members of Congress, from accepting gifts "otherwise than as provided by law." That constitutionally enacted statute cannot be altered or undercut by the unilateral action of the House of Representatives. In essence, Mr. McDade and the Leadership Group argue that the House has the power to make unilateral decisions exempting its Members from criminal liability simply by passing resolutions to that effect. I respectfully disagree. If the House wishes to exempt certain conduct of its Members from prosecution under the gratuities statute, nullifying that law as to them, it can pass a bill to that effect and send it on to the Senate and the President. It is a statutory truth that Congress well knows how to exempt itself from legislation: by statute. *See, e.g., Civil Rights Act of 1991,* Title VII, 42 U.S.C. § 2000e(b); *Occupational Safety and Health Act of 1970,* 29 U.S.C. § 652(5); *Age Discrimination in Employment Act of 1967,* 29 U.S.C. § 630(b). But short of that, members of the House of Representatives are subject to prosecution for accepting illegal gratuities under the same rules as are other public officials.

The Ethics in Government Act of 1989 was enacted to limit the liability of public officials under the gratuities statute by permitting the ethics offices in each branch of government to establish rules for the

acceptance of gifts. Subsection (b)(2) of the Act states: "(A) Subject to subparagraph (B), a Member, officer, or employee may accept a gift pursuant to rules or regulations established by such individual's supervising ethics office. . . . (B) No gift may be accepted pursuant to subparagraph (A) in return for being influenced in the performance of any official act." 5 U.S.C. § 7353(b)(2). This language makes it clear that, regardless of any rules passed by any ethics office, no public official may accept a thing of value in return for being influenced in the performance of his or her official duties. In this case, the indictment charges Congressman McDade with accepting things of value in return for being influenced in the performance of his official acts.[10] Whether Mr. McDade's conduct was within the House Ethics Rules does not matter, except perhaps to show his state of mind while he was

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[10] I note that there is a difference between "legislative acts," which I have held that the indictment does not reach, and "official acts." While the term "legislative act" includes only those acts which are an integral part of the process by which members of Congress consider, pass, and reject proposed legislation, the term "official act" is much broader, applying to almost anything a public official does in his capacity as a public official. For example, interacting with, or attempting to exercise influence over, an executive branch department, is an "official act," and a member of Congress may be prosecuted and convicted under the gratuities statute if he or she accepts gifts in return for taking such action. That action, however, is not a "legislative act" within the protection of the Speech or Debate Clause. *See, e.g., Johnson*; *Brewster*; *Gravel*.

committing the alleged acts, because the Ethics in Government Act does not authorize the House to authorize conduct such as that charged in this indictment.[11]

Things of Value

Congressman McDade argues that the indictment does not adequately allege that he accepted "things of value." He argues that many of the gifts, such as a golf jacket, a golf bag, and a golf umbrella, were *de minimis*. In addition, he argues that many of the travel expenses he allegedly received were reimbursable by the government. Since he would not have paid for the trips anyway, the argument goes, the trips had no value to him. Mr. McDade does not cite any authority for these specific propositions, but he does cite *United States v. Gorman*, 807 F.2d 1299 (6th Cir.1986), for the proposition that the statute's reference to "anything of value" should be construed as referring not to nominal value, but to "substantial value." However, I can find no intimation in *Gorman* that "value" means "substantial value." In *Gorman*, the court found that the gratuities accepted by the defendant had both an

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[11] I decline to decide whether conduct undertaken prior to 1989 was authorized *post hoc*, *i.e.* made unprosecutable, by the Ethics in Government Act, since I find that the Act, even if applicable to pre-1989 conduct, does not authorize the conduct charged here.

objective and a subjective value to him. The facts of that case revealed a defendant who had received substantial value from the gifts, but the court did not hold that items of lesser value would not have qualified for prosecution under the gratuities statute. In fact, the court said that "the focus of the above term ['thing of value'] is to be placed on the value which the defendant subjectively attaches to the items received." *Gorman*, 807 F.2d at 1305 (citing *United States v. Williams*, 705 F.2d 603, 623 (2d Cir.1983), *cert. denied*, 464 U.S. 1007 (1983)).

In *Williams*, the defendant was charged under the gratuities statute for receiving some stock which turned out to have no commercial value. The Second Circuit upheld the district judge's instructions to the jury that "stock could be a thing of value 'if, regardless of its actual worth in the commercial world, you find that the defendant believed that the stock had value for himself'" *Williams*, 705 F.2d at 623. The court noted that the purpose of the bribery and gratuities statutes is to punish misuse of public office, and that the term "thing of value" has been broadly construed to effect that purpose. *Id.*

Here, the government has not assigned monetary values to most of the gifts allegedly accepted by Mr. McDade. However, even the smallest of those items – the golf bag, the golf umbrella, and the golf jacket–are

valuable enough, even objectively, to be prosecuted under the gratuities statute. And, of course, these items may have had additional subjective value to Mr. McDade.[12] As for the purportedly reimbursable travel expenses, it does not matter whether those expenses were reimbursable or not.[13] What matters is Mr. McDade's method of obtaining them. The government alleges that he obtained the trips in illegal ways and from illegal sources. The purpose of the gratuities statute is to punish official misconduct, and the acceptance of gifts in return for a promise, overt or tacit, to exercise influence, is punishable by the statute. That is what the government alleges Mr. McDade did here. Whether or not he could have obtained the same or similar items legally is of no moment.

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[12] For example, the golf jacket was a green "Masters" jacket similar to the one awarded each year to the champion of the Masters golf tournament in Augusta, Georgia. The green jacket is one of the most recognizable and hallowed items of clothing in the world of sports, presumptive covetable by a golf buff – although, concededly, the jacket without the Masters victory is something of an empty vestment.

[13] The government argues that many of the travel expenses were, in fact, not reimbursable by the House of Representatives, and that Mr. McDade's alleged trips were of a different cost, style, and convenience from those which he might have received had he gone through proper channels, *e.g.* trips on Lear jets and accommodations at expensive resorts.

"Personally"

Finally, Mr. McDade argues that the government has failed to allege in the indictment that he accepted some of the alleged gratuities "personally," as the statute requires. Specifically, Mr. McDade points to alleged contributions to his campaign and to the scholarship which his son allegedly received. But fairly examined, the indictment's gratuities counts do not charge Mr. McDade with accepting campaign contributions. Rather, it alleges that Mr. McDade accepted "sham campaign contributions." In other words, the government alleges that these payments were not campaign contributions at all, and that, in reality, Mr. McDade planned to use these funds for his own benefit, rather than for the benefit of his campaign. Thus, he received the contributions "personally."

As for the alleged scholarship, Mr. McDade points out that the government charges that it was provided to his son, not to him. The government argues that the evidence will show that Mr. McDade benefitted personally from the scholarship. During the time in question, the domestic relations law of Pennsylvania was that a parent has a support obligation to pay for the college education of his or her children, as long as payment of the child's college expenses would not result in undue hardship to the parent. *See, e.g., Leonard v. Leonard,* 353 Pa.Super. 604, 510 A.2d 827

(1986); *Lederer v. Lederer,* 291 Pa.Super. 22, 435 A.2d 199 (1981). At the time of the alleged scholarship payment here, this doctrine was considered to be good law in Pennsylvania.[14] Therefore, it follows that, at the time at issue here, the payment of scholarship money to a child bestowed a personal benefit on the scholarship recipient's parents, since the parents were relieved, at least partially, of their duty to pay for the child's education.

I realize, however, that the word "personally" in the statute seems to imply some sort of direct, rather than indirect, benefit to the charged official. The question of whether Mr. McDade benefitted personally from the scholarship payments to his son is one which should be resolved by a jury, rather than by the court in a pretrial motion. The government has alleged that Mr. McDade received some sort of personal benefit from the scholarship. It will be up to the jury to determine whether he actually did.

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[14] In *Blue v. Blue,* ___ Pa. ___, ___, 616 A.2d 628, 632 (1992), the Pennsylvania Supreme Court observed that, in each of the cases cited above, "the Superior Court assumed that a legal obligation existed." In *Blue,* the court overruled those cases, holding that "a parental duty of support is owed until a child reaches 18 or graduates from high school, whichever event occurs later." *Blue,* ___ Pa. at ___, 616 A.2d at 633.

Conclusion

Mr. McDade's assertions notwithstanding, this court cannot require the government to plead its case with more specificity merely because the defendant is a United States Congressman or because the First Amendment and the Speech or Debate Clause may arguably be implicated in this case. I must treat this indictment in the same way as I would treat any other. Because I find that in all counts of the indictment the government has adequately pled each of the elements of the offense of Acceptance of Illegal Gratuities by a Public Official, I shall not dismiss any of the counts.

CONSPIRACY

Motion to Dismiss

Counts One and Three of the indictment charge Congressman McDade with conspiracy to violate the gratuities statute and to defraud the United States of his honest, loyal, and faithful service in his official capacity, under 18 U.S.C. § 371.[15] Since I have found that the government has adequately pled violations of the

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[15] That section holds criminally liable persons who "conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, [where] one or more of such persons do any act to effect the object of the conspiracy, . . ." 18 U.S.C. § 371.

gratuities statute (*see supra*, at A-90 to A-104), I must reject Mr. McDade's argument that the conspiracy counts should be dismissed for failure to adequately plead the elements of the underlying offense.[16]

Mr. McDade also argues that the government has not adequately pled a conspiracy to defraud the United States because (1) the indictment does not charge him with doing anything unlawful, but merely with doing his job, and (2) to prove his honesty, loyalty, or faithfulness would require inquiry into his legislative motivations, which inquiry would violate the Speech or Debate Clause. In *United States v. Johnson*, 383 U.S. at 169, 172, (1966), the Supreme Court wrote: "18 USC § 371 has long been held to encompass not only conspiracies that might involve loss of government funds, but also 'any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government.'" (quoting *Haas v. Henkel*, 216 U.S. 462, (1910).) Here, the government has charged Mr. McDade with conspiring to defraud the United States of his honest, loyal, and faithful service as

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[16] At oral argument, Mr. McDade's counsel also argued that the government had mischaracterized some of Mr. McDade's legitimate and lawful actions as violations of the gratuities statute. Whether the government's or Mr. McDade's interpretation of those actions is correct is a question for the jury, not for the court on a motion to dismiss, where the question is whether the indictment adequately *alleges* a crime.

a United States Congressman. The indictment against Mr. McDade clearly alleges an impairment, obstruction, or defeat of the lawful function of Congress. These allegations go well beyond a Congressman's merely doing his job. The acceptance of illegal gratuities is not, of course, part of a Congressman's job. If proved, it is unlawful behavior which would defraud the United States in violation of § 371.

Further, as discussed above (*see supra*, at A-65 to A-90), the government, in order to prove its case, will not have to introduce evidence that would violate the Speech or Debate Clause. The receipt of bribes and gratuities and the exercise of influence over executive branch departments and agencies is not protected by the Speech or Debate Clause. It is through evidence of acts such as these that the government will attempt to prove that Mr. McDade was dishonest, disloyal, or unfaithful. Proof of Mr. McDade's alleged fraud on the public trust will not require inquiry into his legislative acts, since the fraud is in his alleged acceptance of illegal gratuities and his alleged attempts to influence the functions of the executive branch, which are not legislative acts.

Because I find that the government has adequately pled the elements of the offense of conspiracy, as well as the elements of the underlying offenses contained within the conspiracy counts, and because proof of these offenses will not require the

government to violate Mr. McDade's rights under the Speech or Debate Clause, I shall not dismiss Counts One and Three.

Motion for Pretrial Disclosure of Co-Conspirators' Statements and Pretrial Proof of the Defendant's Connection to the Conspiracies

Congressman McDade argues that he is entitled to pretrial disclosure of the statements of his alleged co-conspirators and to have the government prove, before trial, his connection to the conspiracies. Mr. McDade argues that, if the government fails at trial to connect him adequately to the alleged conspiracies, and the court therefore dismisses the conspiracy counts at the close of the government's case, he will be prejudiced by the fact that the jury will have heard, *inter alia*, allegations of massive government defense-procurement fraud. Mr. McDade speculates that the vast majority of the government's evidence will pertain to the two alleged conspiracies. Consequently, he argues, even if the court were to dismiss the conspiracy counts at the close of the government's case, the jury will have been inundated with evidence of the alleged conspiracies and will be unable to distinguish the evidence that is relevant to the gratuities and RICO counts from the irrelevant conspiracy evidence. In other words, Mr. McDade argues that the whole trial would be tainted with evidence of unproved conspiracies, and that the

jury might convict him of the other charges on the basis of his relationships with some of the government's "undesirable" witnesses.

While it is true that the government must prove the admissibility of co-conspirators' statements before those statements are admitted into evidence under Federal Rule of Evidence 801(d)(2)(E),[17] this court has found no authority for the proposition that such proof must be made before trial. Proof of admissibility is usually introduced during trial, either through the testimony of other witnesses, or contemporaneously with the offering into evidence of the co-conspirator's statement.[18] In fact, in *United States v. Continental Group, Inc.*, 603 F.2d 444 (3d Cir.1979), the Third Circuit upheld the district court's decision to admit co-conspirators' statements subject to the government's *later* establishment of the existence of the conspiracy. Although the court considered "the danger of prejudice

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[17] *See, e.g., Bourjaily v. United States*, 483 U.S. 171 (1987).

[18] In *United States v. McGlory*, 968 F.2d 309, 333 (3d Cir.1992), *cert. denied*, — U.S. —, 113 S.Ct. 415 (1992), the Third Circuit listed the four factors which the government must establish in order to have co-conspirators' hearsay statements admitted into evidence: (1) that a conspiracy existed, (2) that the party and the declarant against whom the statement is offered were both members of the conspiracy, (3) that the statement was made in the course of the conspiracy, and (4) that the statement was made in furtherance of the conspiracy.

to the defendant inherent in the practice of admitting coconspirator declarations, otherwise hearsay, subject to later proof of the requisite conspiracy," it held that the district court's approach was reasonable. *Continental Group,* 603 F.2d at 457. The Third Circuit reaffirmed the validity of admitting co-conspirators' statements subject to later connection in *United States v. Gambino,* 926 F.2d 1355, 1361 (3d Cir.1991), where "the conspiracy became clearly defined only after the testimony of several witnesses."

In this case, Mr. McDade speculates that the government will attempt to introduce co-conspirators' statements subject to later connection. However, the record does not establish whether the government does in fact intend to proceed this way. In *Continental Group* and *Gambino,* the Third Circuit recognized that "the control of the order of proof at trial is a matter committed to the discretion of the trial judge." *Continental Group,* 603 F.2d at 456; *Gambino,* 926 F.2d at 1360. If, at trial, the government attempts to offer the statements of co-conspirators subject to later connection, I will make a ruling upon the full record as it has been developed at that time, but I see no reason to force the government to call its witnesses in for a pretrial evidentiary hearing to prove its conspiracy case in advance. Indeed, I can see a number of obvious reasons why that should not be done, and that precedent not be set.

In *United States v. Ammar*, 714 F.2d 238 (3d Cir.1983), the defendants appealed the trial court's refusal to conduct a preliminary hearing to determine the admissibility of co-conspirators' statements. The Third Circuit affirmed the district court's decision, finding that the district court did not err or abuse its discretion in refusing to hold a hearing.

None of the cases cited in Mr. McDade's brief require a pretrial hearing to establish the existence of a conspiracy. Some Courts of Appeal have held that it is preferable for the district court to require the government to introduce all its non-hearsay evidence first, rather than admitting co-conspirators' statements subject to later connection.[19] Indeed, the Third Circuit has counseled that "the practice of admitting co-conspirator hearsay statements subject to later connection 'be carefully considered and sparingly utilized by the district courts.'" *Gambino*, 926 F.2d at 1360 (quoting *Continental Group*, 603 F.2d at 457). Most assuredly, I will give careful consideration to the circuit courts' preferences if I am confronted with that

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[19] *See, e.g., United States v. Behrens*, 689 F.2d 154 (10th Cir.1982), *cert. denied*, 459 U.S. 1088 (1982); *United States v. Vinson*, 606 F.2d 149 (6th Cir.1979), *cert. denied*, 444 U.S. 1074 (1980); *United States v. James*, 590 F.2d 575 (5th Cir.1979) (en banc); *United States v. Macklin*, 573 F.2d 1046 (8th Cir.1978), *cert. denied*, 439 U.S. 852 (1978); *United States v. Petrozziello*, 548 F.2d 20 (1st Cir.1977).

question at trial. But none of those courts required, or even stated a preference for, pre-*trial* proof of conspiracies, as opposed to pre-admission-of-hearsay proof *at* trial.

I agree with Mr. McDade that this case is complex and that it may present some difficult evidentiary questions. But these questions would be no easier to answer in a pretrial hearing than they would be at trial. At oral argument, the government asserted that it will not require a large number of witnesses to establish the existence of the alleged conspiracies and Mr. McDade's participation in them. Given this fact, and the prejudice that the government would suffer from having to disclose its conspiracy case before trial, as well as the inconvenience and cost of holding a pretrial mini-trial, I shall not order an evidentiary hearing.[20] Mr. McDade may object to the government's introduction of co-conspirators'

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[20] In *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 260 (3d Cir.1983), *rev'd on other grounds sub nom.* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, (1986), the Third Circuit held that the district court had the discretion to order pretrial offers of proof, hearings, and argument because, in that case, the district court had determined that such treatment would be more efficient and could lead to more informed decisions, although the Third Circuit noted that a drawback of making pretrial determinations is that those decisions would be made "without the benefit of the flavor of the record developed at trial."

statements at trial, and I will decide at that time, with the benefit of the record already developed, whether or not to allow the government to introduce those statements subject to later connection. But I do not find this case to be so unusual, nor the danger of prejudice to the defendant so great, as to require a pretrial mini-trial on the conspiracy counts.[21]

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[21] Mr. McDade invites the court's attention to *Kotteakos v. United States*, 328 U.S. 750 (1946), and *United States v. Bertolotti*, 529 F.2d 149 (2d Cir.1975). In those cases, multiple defendants were tried together and convicted of conspiracy. Their convictions were reversed because, in the indictments, the government had alleged a single conspiracy of which all the defendants were a part, but at trial the evidence proved multiple conspiracies, some of which did not involve all the defendants. Each individual defendant was prejudiced by the introduction into evidence of the conspiratorial and other criminal activities of his co-defendants, since many of those activities had nothing to do with the whether each individual defendant was, or was not, guilty.

I recognize that that is always a concern in a conspiracy prosecution, and counsel have my assurance that I shall entertain and sustain timely objections to unfairly prejudicial and irrelevant testimony. But contrary to Mr. McDade's assertion, it does not strike this court as the paradigm of judicial economy to make such determinations before trial. I prefer to confront these issues during the actual testimony at trial, so that I can make the rulings in the context of some evidentiary meat on what are now the comparatively bare bones of the government's allegata.

Motion for Pretrial Standing under Title III to Obtain, and Object to the Admission of, Wiretap Evidence

Congressman McDade moves the court to declare that he has standing to object to the admission of wiretap evidence at trial. Congress addressed the issue of wiretaps in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520. Section 2518(10)(a) reads in relevant part, "Any aggrieved person in any trial, hearing, or proceeding before any court . . ., may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom." Mr. McDade argues that he is an "aggrieved person" within the meaning of the statute. Section 2510(11) defines that term: "'aggrieved person' means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed." Mr. McDade advances the "target standing" theory in support of his argument, arguing that, when a wiretap is directed at certain members of a conspiracy in an attempt to discover evidence of the conspiracy, it is "directed" at all the alleged members of the conspiracy. Mr. McDade invites the court's attention to the Senate Report which accompanied Title III. That report states that the definition of "aggrieved person" "is intended to reflect existing law." S.Rep. No. 1097, 90th Cong., 2d Sess. 66 (1968), 1968 U.S.C.C.A.N. 2112, 2179-80. The

report then cites three Supreme Court cases, including *Jones v. United States,* 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960), and invites the reader to "see" a Second Circuit case on which certiorari had been granted, *United States ex rel. DeForte v. Mancusi,* 379 F.2d 897 (2d Cir.1967). The Supreme Court later affirmed the Second Circuit's decision in *Mancusi v. DeForte,* 392 U.S. 364, 88 S.Ct. (1968). In *Jones,* the Supreme Court held that "anyone legitimately on the premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him." *Jones,* 362 U.S. at 267. In *Mancusi,* the Second Circuit held that a search which the state claimed was "directed" against a local union was actually directed at the defendant, a union official, since the ultimate goal of the state in conducting the search was to uncover evidence of the suspected illegal activities of some union officials. The Supreme Court affirmed the Second Circuit's ruling that the defendant had a reasonable expectation of privacy in the union offices, but did not address the issue of whether the search was "directed" at him.

According to Mr. McDade, the logical extension of *Jones* and *Mancusi,* which Congress intended to embody in Title III, is that a search directed at a conspiracy is directed at all the members of the conspiracy. The government points out that the Supreme Court explicitly rejected the target standing

theory in the Fourth Amendment context in *Rakas v. Illinois*, 439 U.S. 128, (1978). There, the Court held that *Jones* had not recognized target standing, but rather that *Jones* "merely stands for the proposition that a person can have a reasonable expectation of privacy in a place other than his own home." *Rakas*, 439 U.S. at 142. Thus, the Court held, the Fourth Amendment does not, and never did, include the concept of target standing.

Just this week, the Supreme Court unanimously reaffirmed *Rakas* in no uncertain terms, and rejected the argument that there is a co-conspirator exception to the standing rules. In *United States v. Padilla*, 61 U.S.L.W. (U.S. May 3, 1993) (No. 92-207) (per curiam), the Court held that, for Fourth Amendment analysis, participation in a criminal conspiracy neither adds nor detracts from a defendant's reasonable expectation of privacy.

Mr. McDade argues that since Title III predates *Rakas*, that case cannot be used to determine what was "existing law" at the time of Title III's enactment, and that Congress's citation to *Jones* and *Mancusi* indicates that it intended to include target standing in Title III. Whether or not the actual holding of *Rakas* applies to Title III, I agree with the Court's observation that *Jones* did not adopt a theory of standing as broad as that now advanced by Mr. McDade. In fact, even the *Mancusi* court did not envision such a broad definition of

standing. Unlike *Mancusi*, in this case the government named specific targets in the wiretap authorization orders signed by the court, and Mr. McDade was not one of the named targets. Furthermore, Mr. McDade's voice was not recorded on a single one of the recorded conversations. By contrast, in *Mancusi*, the defendant's union offices, which he and other officials shared, were searched, and the defendant had personally prepared many of the documents which were seized. I do not believe that the *Mancusi* court would have extended standing to a defendant who wished to challenge the admission of a document which he had not prepared and which was seized in the office of an organization at which he was not employed. This hypothetical, rather than the actual facts of *Mancusi*, is analogous to Mr. McDade's situation, in which he wishes to challenge the validity of wiretaps of phone calls to which he was not a party, and which were not even made from phones to which he had access.

Also, in *Alderman v. United States*, 394 U.S. 165 (1969), the Supreme Court mentioned Title III in a footnote during its discussion of "existing standing rules." In that case, the Court held that "suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." *Alderman*, 394 U.S. at 171-72. In the

footnote, the Court noted that, when drafting Title III, Congress could have extended the definition of "aggrieved person" beyond the existing law outlined in *Alderman*, but did not. *Id.* at 175, n. 9. Under *Alderman*, Mr. McDade would not have standing under the Fourth Amendment, and the Court's intimation that Title III analysis is the same as Fourth Amendment analysis indicates that the Supreme Court would not grant him standing under Title III either. Further, the *Alderman* court made clear that it was not developing new standing law, but rather was stating "existing law."[22] Thus, even if *Rakas* does not apply to Title III, Mr. McDade has no standing under the existing law of 1968 to challenge these wiretaps.

While the Third Circuit has not, to this court's knowledge, considered the precise argument raised by Mr. McDade here, that court has held that a defendant whose own voice is not intercepted by a wiretap of his co-defendants' phones does not have standing to challenge the wiretaps under Title III. *United States v. Armocida*, 515 F.2d 29, 35, n. 1 (1975) (relying on *Alderman*). Thus, even if Mr. McDade were theoretically correct in his belief that Congress intended to include "target standing" in Title III, I could not rule

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[22] *Alderman* was decided on March 10, 1969, less than ten months after the Senate Report which purported to incorporate "existing law" into Title III was placed into the Congressional Record on May 24, 1968.

that Mr. McDade has standing to challenge the wiretaps in this case, because I am bound by Third Circuit precedent, which clearly holds that he has none.

Finally, since Mr. McDade has no standing to challenge the constitutionality of the wiretaps themselves,[23] he has no right to obtain the wiretap authorization orders.

RACKETEERING

In Count Five of the Indictment, Congressman McDade is charged with Participation in the Affairs of an Enterprise, the Activities of which Affect Interstate Commerce, through a Pattern of Racketeering Activity, under the Racketeering Influenced and Corrupt Organizations ("RICO") Statute, 18 U.S.C. § 1962(c). That section provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

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[23] He may, of course, challenge the admission of the wiretap evidence on other grounds.

18 U.S.C. § 1962(c). Mr. McDade moves the court to dismiss Count Five on the grounds that the government has not adequately pled, and cannot adequately plead, the elements of a RICO violation.

The Enterprise

Mr. McDade argues that the government has failed to adequately plead that he was "associated with" a RICO enterprise. The enterprise alleged in the indictment is "The Office of the Honorable Joseph M. McDade." The government alleges that Mr. McDade supervised the operations and staffs of his congressional offices in Washington, D.C., and Scranton, Pennsylvania, and that he supervised congressional staff members on the House Small Business Committee and the House Defense Appropriations Subcommittee. Mr. McDade is alleged to have utilized these offices and staffs to demand and receive bribes and illegal gratuities and to extort other things of value from defense contractors and lobbyists.

Mr. McDade's first argument is that the government cannot prove the existence of the alleged enterprise because to do so would require an inquiry into his legislative acts, which inquiry would violate the Speech or Debate Clause. However, as discussed above, I find that legislative status is not protected by the Speech or Debate Clause. *See supra*, at A-74 to A-83. If Mr. McDade's status is not protected, it readily follows

that neither are those of his employees. Thus, inquiry into the fact that Mr. McDade was a member of Congress, and that members of his staff were employed by the House of Representatives, does not violate the Speech or Debate Clause. Further, as discussed above, the activities alleged here – demands and acceptances of bribes and gratuities – are not legislative acts. Since inquiry into these alleged activities when performed by Mr. McDade himself does not violate the Speech or Debate Clause, then it again follows that inquiry into the activities of members of his staff in furtherance of these alleged activities also does not violate the Clause. The alleged RICO-violative activities and Mr. McDade's motivations for them are not legislative acts, and the alleged enterprise is not "one big legislative act," as Mr. McDade argues, because legislative status is not protected, and because Mr. McDade's staff members are alleged to have done more than just legislative work.

Next, Mr. McDade argues that "The Office of the Honorable Joseph M. McDade" cannot be charged as the RICO enterprise with which he associated because such pleading violates the "enterprise-person" rule. Under that rule, the person charged under RICO must be separate from the enterprise with which he is alleged to have been associated. This rule was created by the courts to try to further RICO's purpose of preventing organized crime from taking over legitimate businesses by punishing the infiltrators rather than the

corporation. *See, B.F. Hirsch v. Enright Refining Co.*, 751 F.2d 628 (3d Cir.1984). As the Third Circuit has said, "§ 1962(c) was intended to govern only those instances in which an 'innocent' or 'passive' corporation is victimized by the RICO 'persons,' and either drained of its own money or used as a passive tool to extract money from third parties." *Petro-Tech, Inc. v. Western Co. of North America*, 824 F.2d 1349, 1359 (3d Cir.1987). In *Brittingham v. Mobil Corp.*, 943 F.2d 297, 301 (3d Cir.1991), the Third Circuit held that "a § 1962 enterprise must be more than an association of individuals or entities conducting the normal affairs of a defendant corporation."

Mr. McDade essentially argues that he *is* "The Office of the Honorable Joseph M. McDade," and that, therefore, he is analogous to the corporation in *Brittingham*. However, the Third Circuit in *Brittingham* also said that "individual defendants, in contrast to collective entities, are generally distinct from the enterprise through which they act. Unlike a collective entity, it is unlikely that an individual defendant by himself would constitute a valid enterprise. Thus, distinctiveness concerns are generally not present when an individual defendant is also part of an association-in-fact that constitutes the enterprise." *Brittingham*, 943 F.2d at 302 (citations omitted). For this proposition, the court cited *United States v. Benny*, 786 F.2d 1410 (9th Cir.1986), *cert. denied*, 479 U.S. 1017

(1986). In that case, the Ninth Circuit held that the owner of a sole proprietorship which had four employees could be prosecuted under the RICO statute. The court held that, although it is unlikely that a sole proprietor with no employees could "associate" with himself, where the proprietorship has employees, it is a separate entity from its owner, and it can be an enterprise with which the owner can "associate" for RICO purposes. *Accord, McCullough v. Suter*, 757 F.2d 142 (7th Cir.1985).

Mr. McDade further argues that his offices are not the paradigmatic RICO enterprise, which, he says, is the organized crime family where each individual has specific duties and where the organization and its evil purposes continue regardless of the death or imprisonment of any one of the family members. By contrast, he argues, "The Office of the Honorable Joseph M. McDade" will cease to exist when Mr. McDade ceases to be a member of Congress. The offices of the successors to his seat representing Pennsylvania's Tenth District, and to his positions on the committees, will not be a continuation of Mr. McDade's offices; they will be completely new, with new employees and new agendas. According to Mr. McDade, the government may not charge the offices of a member of Congress as a RICO enterprise because a RICO enterprise must have "continuity", and congressional offices do not have continuity.

The government cites numerous cases in which courts have held that the offices of public officials can be RICO enterprises. In *United States v. Joseph*, 526 F.Supp. 504 (E.D.Pa.1981), the defendant was the Clerk of Courts of Lehigh County, Pennsylvania. The charged enterprise was the office of the Clerk of Courts. In the words of the court:

> defendant argues that he *is* the Clerk of Courts and that it is 'ridiculous' to charge him with being associated with, or employed by, himself. Defendant's argument here, too, misses the mark; the Clerk of Courts of Lehigh County is 'an office', to which eligible candidates seek election.... Joseph, although holding that office is not *the* office, he is merely its manager and caretaker. Upon him falls the primary responsibility to oversee, manage and make certain that the responsibilities of the office are properly discharged.

Joseph, 526 F.Supp. at 507 (citations omitted) (emphasis in original). Admittedly, the office of a member of the Congress of the United States is somewhat different from the office of a Clerk of Courts.[24] As Mr.

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[24] In particular, most positions on the staff of a member of Congress would probably be considered to be sufficiently involved with policymaking so as to fall outside the ambit of

McDade points out, "his" employees will probably lose their jobs when he leaves Congress, presumably unlike the employees in the office of the Clerk of Courts of Lehigh County. But *Joseph*'s reasoning still applies here. Mr. McDade is not his office. Mr. McDade is the Representative from the Tenth District of Pennsylvania and the ranking minority member on two House committees. Along with those positions comes a support staff of Mr. McDade's choosing. Together, Mr. McDade and his staff make up the "The Office of the Honorable Joseph M. McDade."

Other courts have also held that political offices can be charged as RICO enterprises. *See, e.g., United States v. Thompson*, 685 F.2d 993 (6th Cir.1982) (en banc), *cert. denied*, 459 U.S. 1072 (1983) (Office of the Governor of Tennessee); *United States v. Long*, 651 F.2d 239 (4th Cir.1981), *cert. denied*, 454 U.S. 896 (1981) (Office of a South Carolina State Senator). The offices of a governor and a state senator, like those of United States Congressman, are made up of employees hand picked by the official. Yet none of those courts dismissed the charges because the defendant was the office or because the enterprise was not indefinitely continuous.

Elrod v. Burns, 427 U.S. 347 (1976) (holding patronage dismissals unconstitutional except for employees in policymaking positions).

As for continuity, an organization need not be indefinitely continuous in order to be charged as a RICO enterprise. During the entire period charged in the indictment, 1983 through 1988, Mr. McDade represented Pennsylvania's Tenth District and was the ranking minority member on the House Small Business Committee. From 1985 through 1988 he was the ranking minority member on the House Defense Appropriations Subcommittee. Throughout this period, Mr. McDade's offices had a continuous existence. Various employees had various specific jobs. Presumably, employees came and went. And when they went, presumably they were replaced, perhaps even augmented. The work of the office, legitimate and allegedly otherwise, went on despite the comings and goings of employees. For the period of time in question, Mr. McDade's offices functioned as a continuous organization in which various replaceable members performed particular roles.

The great weight of authority holds that a sole proprietor or a public official may be charged as associating with his or her proprietorship or office as a RICO enterprise. As the *Thompson* court said, "[t]he case law which has already developed nationwide on the question of identifying a governmental unit as the RICO 'enterprise' is unanimous in rejecting appellants' single appellate contention in this case." *Thompson*, 685 F.2d at 999; *see also*, cases cited therein. The only

additional concern potentially raised in this case is that of the Speech or Debate Clause. But as outlined above, I find that this indictment and this definition of the enterprise do not violate the Clause. This case is not different, enterprise-wise, from *Benny*, *Joseph*, *Thompson*, or *Long*,[25] and the enterprise-person rule simply has no application where the defendant is an individual rather than a corporation. Further, the Supreme Court has held that "[t]here is no restriction upon the associations embraced by the definition" of "enterprise." *United States v. Turkette*, 452 U.S. 576, 580 (1981). Therefore, I hold that the government has adequately pled a RICO enterprise.

The Pattern

Next, Congressman McDade argues that the government has not adequately pled a "pattern of racketeering activity." The Supreme Court has examined RICO's pattern requirement, holding that "to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, *and* that they amount to or pose a threat of

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[25] The only other arguable difference between this case ard those is that here the alleged enterprise is an association in fact, whereas in each of those case the enterprise was also its own legal entity. But I see no reason why an amalgamation of the offices of a single Member of Congress should be treated differently from a single governmental office.

continued criminal activity." *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989) (emphasis in original). Although Mr. McDade raised a continuity argument in the context of his enterprise argument, he does not raise such an argument here. I nonetheless note that the activity charged in this case occurred over a closed period of five years, clearly long enough for a jury to find continuity. In *United States v. Pelullo*, 964 F.2d 193, 210 (3d Cir.1992), the Third Circuit held that "19 months is sufficiently longer than 'a few weeks or months' and indicates the type of long-term criminal conduct Congress sought to eradicate in enacting RICO." (quoting *H.J.*, 492 U.S. at 242). Here, continuity has been more than adequately pled.

Mr. McDade's argument centers on the "relationship" prong of *H.J.*' s definition of "pattern." In *H.J.*, the Court held that the definition of the "relationship" prong under RICO is coextensive with the definition of "pattern" in 18 U.S.C. § 3575(e). *H.J.*, 492 U.S. at 240. That section provides: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e). Mr. McDade argues that the 23 predicate acts charged in the RICO count are isolated and sporadic, and that the two

conspiracies charged within the RICO count are unrelated.

In *United States v. Riccobene,* 709 F.2d 214, 224-25 (3d Cir.1983), the Third Circuit held "that Congress intended that 'a series of agreements that under pre-RICO law would constitute multiple conspiracies could under RICO be tried as a single 'enterprise' conspiracy' if the defendants have agreed to commit a substantive RICO offense." (quoting *United States v. Sutherland,* 656 F.2d 1181 (5th Cir.1981), *cert. denied*, 455 U.S. 949 (1982)). Therefore, it is irrelevant for RICO purposes whether the alleged predicate acts would comprise two or even more conspiracies.

Further, in *Banks v. Wolk*, 918 F.2d 418, 425 (3d Cir.1990), the Third Circuit held: "Once the requisite connection with the RICO enterprise is shown, the fact that a defendant employed different associates for different predicate acts should not be of overriding significance." Under *Banks*, it is insignificant that Mr. McDade employed different staff members to engage in different alleged predicate acts, and it is also insignificant that he allegedly solicited and accepted bribes and gratuities from different sources. As the *Banks* court said, "we focus on the nature of the alleged criminal activity." *Banks*, 918 F.2d at 425.

Taking the *H.J.* factors one at a time, one sees that the government has alleged a sufficient pattern of

racketeering activity. There is a common purpose in all the alleged acts: the acquisition of things of value as bribes and illegal gratuities in return for promises of influence. There is a common result: the acquisition of things of value as bribes and illegal gratuities in return for promises of influence. There is a common victim: the public, which has a right to the honest, loyal, and faithful services of its elected officials. *See, United States v. Zauber*, 857 F.2d 137 (3d Cir.1988). There is a common method of commission: the demand or acceptance of bribes and illegal gratuities. As for the participants, nine predicate acts involve UCC, two involve Westland, two involve Sperry, two involve Kane Paper, two involve Grumman, and six involve GSGS & B. Although Mr. McDade allegedly associated with various different alleged bribers and gratuity-givers, the distinguishing characteristics of the alleged acts are significant: they all involved Mr. McDade's obtaining bribes and gratuities from people or organizations interested in influencing the government or obtaining government contracts.

Finally, the government must show that the affairs of the enterprise are "conducted" through the alleged pattern of racketeering activity. The Third Circuit has held that "one conducts the activities of an enterprise through a pattern of racketeering when: '(1) One is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or

involvement in or control over the affairs of the enterprise; or (2) the predicate offenses are related to the activity of that enterprise.'" *United States v. Provenzano*, 688 F.2d 194, 200 (3d Cir.1982), *cert. denied*, 459 U.S. 1071 (1982) (quoting *United States v. Scotto*, 641 F.2d 47 (2d Cir.1980), *cert. denied*, 452 U.S. 961 (1981)). Here, with the entire indictment grounded on Mr. McDade's use of his position and control over the affairs of the alleged enterprise, the alleged predicate offenses are clearly related to the activity of Mr. McDade's office.

That more than one "scheme" or conspiracy is alleged here does not take this case out of the RICO statute. The defendant need not have solicited bribes or gratuities from the same source during every predicate act. Nor does the defendant need to have solicited bribes and gratuities in return for exercising influence in the same way, or on the same executive branch officials. The "pattern" alleged here is one in which the defendant used his offices and his perceived status as a powerful Member of Congress to obtain things of value from persons seeking to influence the government. That he may have employed different means of committing these acts, or associated with different people when committing them, is of no moment. "In cases such as this, which allege multiple fraudulent schemes conducted through an otherwise legitimate entity, the relatedness requirement should not insulate defendants

who merely vary the methods by which they defraud their victims." *Banks*, 918 F.2d at 425.

Mr. McDade also argues that, in order to disprove the pattern, he will be forced to introduce evidence of his legislative acts, which would violate the Speech or Debate Clause. As discussed above, this indictment does not force Mr. McDade to introduce evidence protected by the Speech or Debate Clause. *See supra*, at A-84 to A-87. The pattern alleged by the government does not involve any legislative acts. The government has alleged a pattern of illegal, extra-legislative acts by Mr. McDade. If Mr. McDade seeks to disprove the government's assertions that those acts are related, he will not have to[26] introduce evidence of his legislative acts. Rather, he will have to examine each alleged act by itself and show why that act is not related to the others. This will not violate the Speech or Debate Clause.

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[26] Of course, Mr. McDade will not have to disprove anything. It is the government, and the government alone, which will have the unshifting burden of proving every element of every crime charged, beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970).

The Racketeering Activity

Congressman McDade also attacks the adequacy of the predicate offenses charged as "racketeering activity." The predicate offenses charged in the indictment are numerous violations of the bribery and gratuities statutes, 18 U.S.C. §§ 201(b)(2) and 201(c)(1)(B) respectively, and extortion in violation of § 1951 of the Hobbs Act. As discussed above, the indictment adequately pleads all the elements of the gratuities statute. *See supra*, at A-85 to A-99. Mr. McDade's arguments concerning the bribery statute are identical to those which he made under the gratuities statute, and my reasoning in rejecting those arguments in the gratuities context applies equally in the bribery context, since all the challenged elements appear in both statutes.

Turning to the Hobbs Act, Mr. McDade argues that corrupt intent is an element of extortion. The statute holds criminally liable "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to do so . . ." 18 U.S.C. § 1951(a). The statute goes on to define extortion: "The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, fear, or under color of official right." 18

U.S.C. § 1951(b)(2). Mr. McDade argues that the definition of extortion by a public official in the Hobbs Act was derived from the common law definition, which contained corrupt intent as an element. Therefore, the argument goes, the element of corrupt intent is implied in the Hobbs Act and must be pled.

In *Evans v. United States*, 504 U.S. —, —, 112 S.Ct. 1881, 1887, 119 L.Ed.2d 57, 70 (1992), the Supreme Court held that "the portion of the statute [the Hobbs Act] that refers to official misconduct continues to mirror the common-law definition." In a footnote, the Court pointed out that "[m]any of the treatise writers explained that at common law, extortion was the corrupt taking or receipt of an unlawful fee by a public officer under color of office." *Evans*, 112 S.Ct. at 1887, 119 L.Ed.2d at 70, n.14. Mr. McDade uses this footnote as a springboard for his argument that the element of corrupt intent must be read into the statute. He cites no case, however, which has held that corrupt intent is an element of extortion by a public official under the Hobbs Act. As for extortion under color of official right at common law, the authority is split as to whether an official must act with a corrupt intent and whether an honest mistake of fact or law is a defense. *See*, Charles E. Torcia, 4 Wharton's Criminal Law § 697, at 483, n.10, n.11, & n.12 (14th ed. 1981), and cases cited therein.

In support of his argument that the Hobbs Act, despite its failure to mention an intent element, actually includes such an element, Mr. McDade argues that extortion is a crime of specific intent crime rather than one of general intent. In *United States v. Furey*, 491 F.Supp. 1048, 1059 (E.D.Pa.1980), the court, after conducting a lengthy examination of the common law offense of extortion, held:

> The Hobbs Act clearly and revealingly does not contain the 'knowingly' and/or 'willfully' language that brings into play the 'specific intent' exception. Furthermore, the legislative history of the statute indicates that, during the passage of the statute, an amendment had been proposed as an alternative to the present § 1951 which did contain the 'knowingly or willfully' language but was subsequently rejected by Congress. That Congress was aware of the alternate specific intent language but nevertheless did not include it in the presently codified § 1951 clearly indicates that the Hobbs Act was not intended to be a specific intent statute.

(footnote omitted). I find the *Furey* court's reasoning persuasive, at least as to extortion by fear, which that case was about.

Further, it is notable that the Hobbs Act deals with extortion by fear and extortion under color of official right together. At least on the face of the statute, the elements of the two types of extortion seem to be co-extensive. In *Evans*, the Supreme Court did not mention that there might be an additional element to the common law crime of extortion under color of official right,[27] even though the question before the Court was about a difference in the elements of extortion by fear and extortion under color of official right.[28] Thus, neither Congress nor the Supreme Court has said that corrupt intent is an element of either of the two types of extortion under the Hobbs Act. This silence is significant because, if there were an intent element in the Hobbs Act's definition of extortion under color of official right, then public officials would be treated differently from private individuals under the Hobbs Act, i.e. public officials, but not private citizens,

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[27] In his concurrence, Justice Kennedy did address this question, noting the conflict in the state courts as to whether corrupt intent is an element of extortion at common law. He concluded, "our modern jurisprudence would require that there be a mens rea requirement now." *Evans*, 119 L.Ed.2d at 78 (Kennedy, J., concurring in part and concurring in the judgment).

[28] Specifically, the Court held that the "inducement" requirement in s 1951(b)(2) applies only to private individuals, and that, even if it applied to public officials, the "coercive element would be satisfied by the public office itself." *Evans*, 119 L.Ed.2d at 71.

would have to have a corrupt intent in order to be convicted of extortion. Presumably, Congress or the Supreme Court would have mentioned this important difference if in fact it exists. Instead, the Court said, "[w]e hold today that the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Id.* at 72. That is precisely what the government has alleged here.

In addition, I hold that, even were corrupt intent an element of extortion under color of official right, this indictment sufficiently pleads that element. In Predicate Act 1, the indictment alleges that Mr. McDade "did unlawfully and knowingly attempt to obstruct, delay and affect interstate commerce . . . by obtaining and causing to be obtained $10,000 from representatives of UCC, with those persons' consent, such consent having been induced under color of official right and by a wrongful use of fear of economic loss." In Predicate Act 11(a), the indictment alleges that Mr. McDade "did unlawfully, willfully, and knowingly attempt to obstruct, delay and affect interstate commerce . . . by obtaining and causing to be obtained from representatives of Westland, the payment of jet aircraft transportation from Washington, D.C. to VanNuys, California, with those persons' consent, such consent having been induced under color of official right and by a wrongful use of fear of economic loss."

"Knowingly" means "that the defendant knows factually what he is doing," *United States v. Baytank (Houston), Inc.*, 934 F.2d 599, 613 (5th Cir.1991), or that the defendant acted with "actual consciousness." *United States v. Bader*, 956 F.2d 708, 710 (7th Cir.1992). To act "unlawfully" means simply to act in violation of the law. *See, United States v. Busic*, 587 F.2d 577 (3d Cir.1978). Thus, to act "knowingly and unlawfully" is to act consciously in violation of the law. In *United States v. Malinowski*, 472 F.2d 850, 853 (3d Cir.1973), the Third Circuit upheld the district court's definition of "willfully" as "done voluntarily and intentionally, and with the specific intent to do something the law forbids." Thus, the addition of "willfully" to "knowingly and unlawfully" adds, if anything, an additional allegation of purposeful action.

In *Malinowski*, the Third Circuit also held that "'bad purpose' and 'evil purpose' are not 'magic words' which must be included in a jury charge on wilfulness." *Malinowski*, 472 F.2d at 855. The same is true here. The words "corrupt intent" are not magic, and especially in light of the doubt over whether corrupt intent is even an element of the crime of extortion, the government cannot be expected to use those precise words in the indictment. The decision whether to dismiss a count of a criminal indictment should not turn on the government's inclusion or omission of specific words. Rather, the court should examine the overall conduct

alleged. Here, the charging language of the alleged predicate acts of extortion, taken as a whole, alleges that Mr. McDade acted knowingly and intentionally in violation of the law to obtain things of value for himself in return for exercising his influence as a United States Congressman.

In *United States v. Reeves*, 752 F.2d 995, 998 (5th Cir.1979), the court held that "'corruptly' ordinarily describes '[a]n act done *with an intent to give some advantage* inconsistent with the official duty and rights of others.'" (quoting *United States v. Ogle*, 613 F.2d 233, 239 (10th Cir.1979)) (emphasis supplied in *Reeves*). In *United States v. North*, 910 F.2d 843, 881 (D.C.Cir.1990), the court wrote: "[a] 'corrupt' intent may also be defined as 'the intent to obtain an improper advantage for [one]self or someone else, inconsistent with official duty and the rights of others.'" (quoting Ballentine's Law Dictionary 276 (3d ed. 1969)). Although the government here does not specifically use the words "corrupt intent" or "corruptly" in the indictment, its allegations charge precisely the type of behavior described by these courts.[29] Thus, I find that,

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[29] Additionally, I note that in *United States v. Poindexter*, 951 F.2d 369, 379 (D.C.Cir.1991), the court held that, in the context of 18 U.S.C. § 1505, "the term 'corruptly' is too vague to provide constitutionally adequate notice that it prohibits lying to Congress." In reaching this conclusion, the court relied on the traditional definitions, both in legal opinions and

even if corrupt intent is an element of the crime of extortion under the Hobbs Act, the government has adequately pled that element.

Congressman McDade also argues that the indictment's Hobbs Act allegations fail to include a quid pro quo. As discussed above, there is no quid pro quo requirement under the Hobbs Act outside the context of campaign contributions. Thus, the government need not plead a quid pro quo for Mr. McDade's alleged demand and acceptance of funds for the "Five Great Americans Concert", or for travel expenses, since these actions are not afforded the special First Amendment status granted to campaign contributions. *See supra*, at A-91 to A-95.

Finally, Mr. McDade argues that the Hobbs Act allegations are duplicitous because they allege both extortion by fear and extortion under color of official right. The rule against duplicity prohibits the government from joining two or more distinct offenses in a single count, because if a jury were to return a general verdict on a duplicitous count, it would be

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in dictionaries, of "corrupt" and "corruptly." Thus, in asking the court to read a corrupt intent requirement into § 1951 of the Hobbs Act, Mr. McDade is asking the court to read an element into a statute that, if included in the facial language of the statute itself, might render the statute unconstitutionally vague.

unclear as to which offense the defendant had been convicted or acquitted. *United States v. Starks*, 515 F.2d 112 (3d Cir.1975). However, the rule does not prohibit the government from alleging two or more methods of completing the same crime in a single count. "[D]eciding that there are separate offenses must be supported by a finding of legislative intent to provide multiple punishment for the same conduct." *United States v. Milestone*, 626 F.2d 264, 269, n. 8 (3d Cir.1980). Here, the government has alleged that Mr. McDade violated the Hobbs Act both under color of official right and through fear. Extortion is one crime. The two methods of accomplishing it are listed together in one section. It may be committed by instilling fear in the victim, or it may be committed under color of official right. But it is one crime carrying one punishment. Mr. McDade cannot be punished twice for the same alleged act of extortion. Therefore, the government's joinder of allegations of extortion by fear and extortion under color of official right does not violate the rule against duplicity. *See, United States v. Ray*, 690 F.Supp. 508, 512 (M.D.La.1988).

Mr. McDade also makes an argument based on the Speech or Debate Clause. He argues that, in order to prove that he acted "under color of official right," the government will have to introduce evidence of his legislative status and his legislative acts. As discussed above, legislative status, by itself, is not protected by

the Speech or Debate Clause. *See supra*, at A-71 to A-79. And the indictment does not make reference to any of Mr. McDade's legislative acts. The acts charged here are extra-legislative, and prosecution of them does not implicate the Speech or Debate Clause.

Under extortion by fear, the reasonableness of the victim's fear is a factor. As stated above, the proof or disproof of the reasonableness of the victims' fears will not require the introduction of evidence protected by the Speech or Debate Clause, since instructive or educational evidence about the procedures of Congress and Congressional committees is not protected by the Speech or Debate Clause. *See supra*, at A-79 to A-81.

Conclusion

Because I find that (1) Count Five of the indictment adequately alleges all the elements of a RICO violation, including a valid enterprise and a sufficient pattern of racketeering activity, (2) the indictment adequately alleges all the elements of the charged predicate offenses of bribery, acceptance of illegal gratuities, and extortion, (3) Count Five of the indictment is not duplicitous, and (4) Count Five of the indictment does not violate the Speech or Debate Clause, I shall not dismiss Count Five, the RICO count, of the indictment.

BILL OF PARTICULARS

Next, Congressman McDade moves the court to order the government to provide a bill of particulars under Federal Rule of Criminal Procedure 7(f). The Third Circuit has held that the trial court has broad discretion in deciding whether to require a bill of particulars. *United States v. Addonizio*, 451 F.2d 49, 64 (3d Cir.1972), *cert. denied*, 405 U.S. 936 (1972). The defendant need not show cause to obtain a bill of particulars, but a bill of particulars is meant to serve a specific purpose, namely "'to inform the defendant of the nature of the charges brought against him to adequately prepare his defense, to avoid surprise during the trial and to protect him against a second prosecution for an inadequately described offense.' A bill of particulars should fulfill this function 'when the indictment itself is too vague and indefinite for such purposes.'" *Addonizio*, 451 F.2d at 63-64 (citations omitted). The Third Circuit observed that one purpose of a bill of particulars is to diminish the "sporting theory" of criminal justice, but also that "a defendant is entitled neither to a wholesale discovery of the Government's evidence, nor to a list of the Government's prospective witnesses." *Id.* (citations omitted).

In this case, the government has issued a 43-page amended indictment against Congressman McDade. It

has also provided voluminous discovery. Mr. McDade has a highly competent defense team of perhaps a dozen members, which has been examining the government's disclosures for nearly a year now. The motions filed throughout this case by Mr. McDade's counsel, and the performance of his counsel during the numerous oral arguments and conferences in the case, convince the court that Mr. McDade and his counsel are well-informed of the charges against him and have more than enough information to prepare an adequate defense.[30]

In *United States v. Kenny*, 462 F.2d 1205, 1212 (3d Cir.1972), the Third Circuit affirmed the district court's refusal "to require the Government to answer a set of detailed interrogatories in the guise of a bill of particulars." Mr. McDade's request here is 20 pages long, and it reads very much like a set of detailed interrogatories. It is not necessary for the government to disclose the names of all of Mr. McDade's alleged

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[30] In fact, in December, 1992, Mr. McDade's counsel complained to the court that the government had provided *too much* discovery, and that the defense team was having trouble sifting through it all. In an attempt to help the defense team zero in on the government's case and to avoid unnecessary duplicity, this court issued a Memorandum and Order directing the government "to tell the defense of any discrete parcels of material that it does not plan to use at trial." *United States v. McDade*, 61 U.S.L.W. 2413 (E.D.Pa. Dec. 11, 1992) (Crim.A. No. 92-249) (emphasis in original).

co-conspirators or all the overt acts allegedly performed by Mr. McDade in furtherance of the conspiracy, unless the failure to disclose such information would prevent the defendant from adequately preparing a defense. In this case, the indictment is detailed enough, and discovery has been generous enough, to present Mr. McDade with a clear picture of the charges against him and to enable him to prepare an adequate defense. The government is not required to "weave the information at its command into the warp of a fully integrated trial theory for the benefit of the defendants." *Addonizio*, 451 F.2d at 64. Therefore, I shall deny the motion for a bill of particulars.

VENUE

Finally, Congressman McDade requests the court to transfer this case to the Middle District of Pennsylvania, which encompasses Mr. McDade's entire congressional district and in which he resides,[31] for trial. Mr. McDade argues that most of the alleged activities in this case took place either in the Middle District of Pennsylvania or in the District of the District of Columbia, and that the government filed this

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[31] The government points out that Mr. McDade's principal residence, albeit not his domicile, might actually be in the Eastern District of Virginia, where he lives while Congress is in session.

case in the Eastern District of Pennsylvania, where venue is artificial, for strategic reasons.

The Constitution states: "The Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed." U.S. Const., art. III, § 2, cl. 3. The Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ." In *Platt v. Minnesota Mining & Mfg. Co.*, 376 U.S. 240, (1964), the Supreme Court held that a defendant has no right to be tried in his home district. Rather, the constitutional venue consideration is the determination of where the crime was committed. *Platt*, 376 U.S. at 245.

In a case such as the one at bar, where the alleged crimes took place in multiple districts, 18 U.S.C. § 3237(a) becomes relevant. That section provides: "any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed." 18 U.S.C. § 3237(a). Congressman McDade does not dispute that venue is proper in the Eastern District of Pennsylvania, since the government has alleged at least one act which occurred in the Eastern District in each count of the indictment. Rather, Mr.

McDade argues that the court should exercise its broad discretion under Federal Rule of Criminal Procedure 21(b) to transfer the case for the convenience of the parties and witnesses.

Rule 21(b) provides: "For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to that defendant or any one or more of the counts thereof to another district." Fed.R.Crim.P. 21(b). In *Platt*, the Supreme Court listed ten factors for district courts to consider when deciding whether to transfer a case under Rule 21(b). They are: (1) location of the defendant, (2) location of possible witnesses, (3) location of events likely to be in issue, (4) location of documents and records likely to be involved, (5) disruption of defendant's business if the case is not transferred, (6) expense to the parties, (7) location of counsel, (8) relative accessibility of place of trial, (9) docket condition of each district involved, and (10) any other special elements. *Platt*, 376 U.S. at 243-44.

I analyze the *Platt* factors seriatim. As for the first factor, location of the defendant, Mr. McDade apparently splits his time between Scranton and the Washington, D.C. area, not a dispositive reason to transfer this case to the Middle District.

As to the second factor, location of witnesses, the government has stated that it intends to call approximately twenty witnesses who reside in the

Eastern District, and only three who reside in the Middle District. Mr. McDade says that he intends to call many character witnesses who reside in the Scranton area.[32] But the Northeast Extension of the Pennsylvania Turnpike allows one to drive from Scranton to Philadelphia in less than three hours, which is not so great a trip as to require a transfer.

As for the location of the events at issue in this case, UCC, which is a major player in three of the five counts in the indictment, is incorporated in Lancaster, in the Eastern District of Pennsylvania, and the checks allegedly sent from UCC to Mr. McDade were drawn on accounts in the Eastern District. While some of the alleged events did occur in the Middle District, most of them simply involve Scranton as being the destination for some of the flights allegedly taken by Mr. McDade. Mr. McDade argues that the "nerve center" theory for transfer articulated in *United States v. Haley*, 504 F.Supp. 1124 (E.D.Pa.1981), should persuade the court to transfer this case to the Middle District. But there is a significant difference between *Haley* and this case. In *Haley*, the defendants requested, and were granted, transfer of their case to the district in which the "nerve center" of their alleged activities was located. In

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[32] The government has moved to exclude, or at least to substantially limit, the testimony of many of these witnesses. I shall address that motion during trial, in the context of the record which has been developed at that time.

contrast, if there is a "nerve center" in this case, it is in the District of the District of Columbia, where most of Mr. McDade's congressional work, and especially his committee work, takes place. Yet Mr. McDade requests a transfer to the Middle District of Pennsylvania, which is no more the "nerve center" of the activities alleged in this case than is the Eastern District of Pennsylvania.

The fourth factor, the location of documents, also advises the court against a transfer. There are three major document repositories in this case. They are located in Philadelphia, New York City, and Arlington, Virginia, none of which is located in the Middle District of Pennsylvania.

The next factor is the disruption of the defendant's business. Granted, being involved in a criminal trial will undoubtedly disrupt Mr. McDade's ability to function as a United States Congressman. But I do not find that holding the trial in Philadelphia will provide substantially greater disruption than would holding it in Scranton. The House of Representatives sits in neither place, nor generally do its committees. While Mr. McDade does have an office in Scranton, he still could not function normally out of that office, since he could not participate in House debates and committee meetings, and since he would be in court during most business hours. Modern conveniences such as the telephone and the fax machine will make it

equally easy for Mr. McDade's Washington staff to communicate with him in Philadelphia or in Scranton. And Mr. McDade's Scranton staff has, no doubt, often gone for lengthy periods without the presence of Mr. McDade. Standing trial in Philadelphia will not disrupt Mr. McDade's business substantially more than any other defendant's business is disrupted by having to defend criminal charges. Wherever the trial takes place, it is the fact of the trial, not its situs, which will be the preoccupying factor tending to distract Mr. McDade from the performance of his congressional business.

As for the rest of the *Platt* factors, the combined expense to Mr. McDade and the government is not likely to be much different in Philadelphia from that in Scranton. Mr. McDade has retained counsel in both locales, as well as counsel from elsewhere, and both of the government's counsel are located in Philadelphia. I find Philadelphia to be as accessible as, if not more accessible than, Scranton for the defendant, counsel, the potential witnesses, and interested observers. Finally, as to the last factor, this court's docket is current, and even if it were not, this case would get a priority listing under the Speedy Trial Act, 18 U.S.C. § 3161, *et seq.*, since it is a criminal case.

Mr. McDade also argues a special, pragmatic consideration. In order to convict a defendant of a crime, the government must prove venue. *United States*

v. Passodelis, 615 F.2d 975 (3d Cir.1980). Mr. McDade argues that, since some of the counts of the indictment contain tenuous connections to the Eastern District, the government may have a difficult time proving that Mr. McDade engaged in illegal activity in this district. Therefore, some of the charges against Mr. McDade might have to be dismissed at the close of the government's case, or any convictions might be reversed on appeal. But that is not a consideration for the court at the pretrial stage. For better or for worse, the government has chosen to bring this case in the Eastern District, and it has assumed the jurisdictional risks inherent in that decision. If it fails properly to establish venue for any of the crimes charged, those counts will be dismissed at the appropriate time. If the court wrongly declines to dismiss those counts, the convictions will likely be reversed on appeal. This is so in every criminal case. But, for now, my consideration is whether the government has *alleged* proper venue. It has. Any concern over proof of venue can be taken up during trial, and should that proof fail, it should ultimately work to the defendant's benefit.

At oral argument, counsel for Mr. McDade brought up another special consideration, one that I regard as having more substance in this case than the litany of change-of-venue criteria just discussed. He argued that Mr. McDade would not get a fair trial in Philadelphia because the jury would not give much

heed to the character testimony of Mr. McDade's witnesses. Mr. McDade argues that, since Philadelphians consider themselves to be more sophisticated than their neighbors in other parts of the Commonwealth of Pennsylvania, they will not view Mr. McDade's character witnesses, most of whom will hail from small towns in Mr. McDade's congressional district, as knowledgeable, reliable, credible witnesses. According to Mr. McDade, some of these witnesses will be prominent members of their communities, deserving of the jury's highest regard, but a jury full of Philadelphians will give less credence to the testimony of small town leaders than would residents of other small towns.

I do not necessarily accept Mr. McDade's assertion that Philadelphians are, on the whole, closed-minded and condescending.[33] On the contrary, they strike me as a varied batch. But more significantly, Philadelphia makes up only part of the Eastern District of Pennsylvania. The Eastern District consists of ten counties, many of which are rural and most of which

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[33] I do note, however, that it seems common of Philadelphians generally, and perhaps Philadelphia lawyers in particular, to refer to the other 66 as "the counties," as if the City of Brotherly Love were not itself a county. This has always struck me as displaying a touch of supercilious, parochial, geographic myopia. However, I think the term's use is mainly confined to members of the bar, who even now are but a minority of the city's population.

contain small towns. The jury panel in this case will presumably comprise people from all over the Eastern District, thereby containing Philadelphians, rural residents, and small-town natives alike.

In addition, the government points out that it would be equally, if not more, difficult to get a fair jury in the Scranton area, where nearly everyone at least knows of Mr. McDade, and where this case has received plentiful press coverage.[34] For this reason, the practical effect of this motion is substantial. At oral argument, counsel for Mr. McDade conceded that Mr. McDade would be more likely get a favorable array of prospective jurors when picking from his friends, neighbors, and constituents, than he would in a relatively strange vicinage.

By all accounts, Congressman McDade has worked to some considerable effect to rejuvenate the economy in his congressional district, and that fact has not gone unappreciated on the home front. But just as judge-shopping should be eschewed, so should jury-shopping. There is no suggestion that the defendant could not get a fair trial in the hands of twelve citizens of the Eastern District of Pennsylvania, but there is

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[34] Again, however, the Middle District consists of a much wider area than just Scranton. Specifically, that district includes 32 counties and many cities and towns, including the Harrisburg metropolitan area.

some suggestion that the government could perhaps get less than a fully unfair trial were the case tried in Mr. McDade's congressional district. It must be remembered that it is not just the defendant, but also the government, that is entitled to a fair trial.

But neither of those factors is the real reason for my ruling. Rather, I have sought to make this venue call on a straight application of established caselaw to the facts of this case. To sum up, I find that venue is proper in the Eastern District of Pennsylvania, and that neither the *Platt* factors nor the additional arguments raised by Congressman McDade justify transferring this case to the Middle District of Pennsylvania, especially in light of the contiguous proximity of the two districts. Although it is arguably within the discretion of the court to transfer this case, Mr. McDade will not be prejudiced by having to stand trial in Philadelphia, and Scranton would not be a more convenient place to try the case. I conclude that this case is not an appropriate one for my stepping in and divesting the government of its legally proper election of venue.

An Order follows.

ORDER

AND NOW, this 6th day of May, 1993, upon careful consideration of all the pretrial motions of the defendant, and after argument in open court, the following motions are DENIED:

Motion to Dismiss the Indictment to the Extent that it Contravenes the Speech or Debate Clause

Motion to Dismiss the Indictment for Failure to Plead Adequately the Elements of 18 U.S.C. § 201(c)(1)(B)

Motion to Dismiss Counts I and III for Failure to Plead Adequately the Elements of Conspiracy

Motion for Pretrial Disclosure of Co-Conspirators' Statements and for Pretrial Proof of Connection to the Conspiracy

Motion for Pretrial Standing under Title III to Obtain Evidence Related to Other Conspiracies

Motion to Dismiss Count Five for Failure to Allege the Elements of a RICO Violation

Motion for Bill of Particulars

Motion to Transfer to the Middle District of Pennsylvania

ORDER

AND NOW, this 6th day of May, 1993, upon careful consideration of all the pretrial motions of the government, and after argument in open court, the motions are resolved as follows:

Omnibus Motion in Limine is DENIED as unripe. The issues of the admissibility of prosecutorial motive in seeking the indictment, the non-criminal behavior of the defendant on other occasions, specific instances of the defendant's good conduct, and the intent and opinions of other legislators regarding the merits of specific legislation shall be addressed when and if they arise during trial.

Motion in Limine DENIED as unripe. The issue raised in this motion shall be addressed when and if it arises during trial. The papers filed in support and in opposition to this motion shall remain under seal.

Motion to Admit Tape Recordings and Video Recordings is DENIED. The procedure for ascertaining the accuracy of any tapes offered into evidence in this case shall be in accordance with this court's Standing Order on that subject, a copy of which is attached.

Motion for Production of Statements of Witness Pursuant to Fed.R.Crim.P. 26.2 is GRANTED. Pursuant to the agreement of the parties, the defendant shall produce the statements of its witnesses as far in advance of the anticipated beginning of the defense case as the government produces the statements of its witnesses in advance of its case. The parties shall attempt to come to an agreement on the specific amount of time.

Motion for Production of Objects Pursuant to Fed.R.Crim.P. 17(c) is GRANTED. At oral argument, the parties represented to the court that they could come to an agreement on the time for production of the objects. They shall be permitted to do so.

In addition, the parties have filed supplemental motions relating to the production by the defendant of original checks, check stubs, and travel and itinerary binders. After careful consideration of those motions, and after telephone conference, the government's Supplemental Motion for Production of Documents Pursuant to Fed.R.Crim.P. 17(c) is DENIED, and the defendant's Motion to Quash the Subpoena Seeking Production of Documents is GRANTED.*

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* The government acknowledges that it has received copies of all the documents at issue in these motions. However, the government asserts that it is entitled to Congressman McDade's ordering of the documents, i.e. the sequence in which he, his

staff, and his counsel placed them. Apparently, Mr. McDade turned over the documents, in order, during the grand jury proceedings. The documents then passed through various hands, including Mr. McDade's former counsel, counsel for the House of Representatives, counsel for the government, and the grand jury. When the documents finally reached Mr. McDade's current counsel, they were in disarray, their orderly order seemingly shuffled. Mr. McDade's counsel then re-ordered the documents.

According to the government, the documents are discoverable in their new configuration, since that configuration is merely a reproduction of the original order. But Mr. McDade's counsel, Salvatore Cognetti, Esquire, has represented to the court that the current configuration is not merely a reproduction of the original order, but rather a hybrid of the original order and a classification prepared in anticipation of trial. Therefore, he argues, the current ordering is attorney work product. Further, he seems to suggest that, even for those portions of the current composition which are not reflective of original thought, but a reiterative reconstruction of the original sequence, the labor taken to arrive at that reconstructed order was that of attorneys, and that therefore the government should not be allowed to partake of the product of that work.

In *Sporck v. Peil*, 759 F.2d 312, 316 (1985), the Third Circuit held that "the selection and compilation of documents by counsel in this case in preparation for pretrial discovery falls within the highly-protected category of opinion work product." Even if I were to conduct an in camera review of these documents, I would have no way of telling whether the documents are in their original order or an order which contains a trial-preparatory motive. The persons best situated to make this determination are Mr. Cognetti and Mr. McDade's secretary, Ms. Carol Berg. Taking Mr. Cognetti at his word, I

find that the production of these documents would raise considerable work product concerns under *Sporck*. Further, the government has at its disposal the ability to reproduce, at least to a large extent, the original order of the documents. For example, the government could take the deposition of Ms. Berg, and ask her to help put the documents back in order. Therefore, I shall not order Mr. McDade to turn over the re-configured binders.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-1487

UNITED STATES OF AMERICA

v.

JOSEPH M. McDADE,

Appellant

Appeal from the United States
District Court for the
Eastern District of Pennsylvania
(D.C. Criminal No. 92-00249-01)

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, and MCKEE, *Circuit Judges* and BASSLER, *District Judge.*[*]

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[*] Honorable William G. Bassler, United States District Judge for the District of New Jersey, sitting by designation, as to panel rehearing only.

(Filed August 9, 1994)

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the Court in banc, the petition for rehearing is denied. Judge Becker, Judge Hutchinson, Judge Scirica, and Judge Lewis would grant rehearing.

Supreme Court, U.S.
FILED
DEC 7 1994
OFFICE OF THE CLERK

No. 94–849

In the Supreme Court of the United States

OCTOBER TERM, 1994

JOSEPH M. MCDADE, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE U.S. HOUSE OF REPRESENTATIVES, AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR CERTIORARI

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DECEMBER 1994

QUESTION PRESENTED

Does the Speech or Debate Clause's protection of a Member of Congress against being "questioned in any other Place" allow indicting him for his legislative committee role and legislative oversight activity?

TABLE OF CONTENTS

	Page
Question Presented	I
Table of Cases and Authorities	III
Interest of the Amici Curiae	1
Statement of the Case	2
Summary of Argument	7
Reasons For Granting the Writ	7
1. The Third Circuit Has Split With the Eleventh Circuit Regarding An Important Constitutional Question Concerning the Separation of Powers	7
2. This Court Should Repair the Damage Done to the Protection For Congressional Oversight	11
Conclusion	15

TABLE OF CASES AND AUTHORITIES

Cases:

Bowsher v. *Synar*, 478 U.S. 714 (1986)	1, 4
Doe v. *McMillan*, 412 U.S. 306 (1973)	8
Eastland v. *United States Servicemen's Fund*, *421 U.S. 491 (1975)*	*passim*
Gravel v. *United States*, 408 U.S. (1972)	8
Helstoski v. *Meanor*, 442 U.S. 500 (1979)	14
Hutchinson v. *Proxmire*, 443 U.S. 111 (1979)	8
Sinclair v. *United States*, 279 U.S. 263 (1929)	11, 12
United States v. *Brewster*, 408 U.S. 501 (1972)	14
United States v. *Helstoski*, 442 U.S. 477 (1979)	7
United States v. *Johnson*, 383 U.S. 169 (1966)	7, 10
United States v. *Swindall*, 971 F.2d 1531 (11th Cir. 1992), cert. denied 114 S.Ct. 683 (1994)	*passim*
Watkins v. *United States*, 354 U.S. 178 (1957)	12

Constitution, Statutes, and Legislative Materials:

U.S. Const., art. I., § 6, cl. 5	*passim*
House Rule X	2

Page

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94–849

JOSEPH M. MCDADE

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE U.S. HOUSE OF REPRESENTATIVES, AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR CERTIORARI

INTEREST OF THE AMICI CURIAE

The Speaker and Bipartisan Leadership Group of the House of Representatives ("House *amici*")[1] have been a regular mechanism for the House to present its institutional position in litigation. *See, e.g., Bowsher* v. *Synar,* 478 U.S. 714 (1986); *United States* v. *Swindall,* 971 F.2d 1531 (11th Cir. 1992), *cert. denied,* 114 S.Ct. 683 (1994). This appeal presents issues of importance for the committee system of the House of Representatives. House *amici* participated in the briefing and argument of this case, both in district court, *United States* v. *McDade,* 827 F. Supp. 1153 (E.D. Pa. 1993), (A–62 to A–158), and before the panel of the court of appeals. *United States* v.

[1] The amici curiae are the Honorable Thomas S. Foley, Speaker of the House of Representatives, and the Bipartisan Leadership Group of the House of Representatives, consisting of the Honorable Richard A. Gephardt, Majority Leader; the Honorable Robert H. Michel, Republican Leader; the Honorable David E. Bonior, Majority Whip; and the Honorable Newt Gingrich, Republican Whip.

McDade, 28 F.3d 283 (3d Cir. 1994) (one judge dissenting), (A–1 to A–61.) House *amici* also participated in the briefing of the petition for rehearing *en banc*, *reh'g en banc denied*, 28 F.3d 283, 305 (3d Cir. 1994) (four judges dissenting), (A–159 to A–160).

STATEMENT OF THE CASE

A divided panel of the Third Circuit split with the Eleventh Circuit on a fundamental aspect of the Speech or Debate Clause. Since the root of the issue is the content of the Indictment regarding Representative McDade's role and activities as Ranking Minority Member on the House Subcommittee on Defense Appropriations and the House Small Business Committee, and the oversight activity of the Defense Appropriations Subcommittee, a statement of the case appropriately describes these.

In its structure, its theories, and its emphasis, the Indictment focuses on Representative McDade's committee role. The Indictment consists of five counts. Its RICO count, Count Five, builds on two conspiracy counts, Counts One and Three, each of which connects to one of two gratuity counts, Counts Two and Four. The Indictment charges Representative McDade with receiving various gratuities and with conspiracy, but it does not stop there, as prior indictments of Members of Congress have stopped; it uses his committee assignments and oversight activity against him. Count Three relies upon the allegation that "[i]n or about January, 1985, defendant McDADE became ranking minority member of the House Appropriations Committee, Subcommittee on Defense Appropriations."[2] The House of Representatives establishes, by House Rule X, the Defense Appropriations Subcommittee to conduct the annual legislative cycle for the $300 billion defense appropriation bill, with the accompanying oversight.

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[2] This is first alleged in Count One, para. 3 at 2; in Count Three, it is realleged by incorporation in Count Three, para. 1 at 16.

Count One also relies upon the defendant's committee leadership assignment, starting, in para. 2 of the Indictment, with "Beginning in or about 1982, defendant McDADE was ranking minority member of the House Small Business Committee." Indictment at 1. This count focuses both on the office of Ranking Minority Member for the House Small Business Committee, and on the Ranking Minority Member's committee staff. Count Five's RICO charge defines the defendant's racketeering "enterprise" squarely in terms of his legislative committee assignments. It defines the enterprise as follows, in pertinent part:

THE ENTERPRISE

> 3. Defendant JOSEPH M. McDADE . . . supervised the activities of Congressional staff members who worked at his direction on the *congressional committees* on which he held *official positions.* Defendant JOSEPH M. McDADE, together with these offices and individuals, constituted an enterprise as defined in Title 18, United States Code, Section 1961(4).

Indictment, Count Five, para. 3 at 24 (emphasis added). Count Five begins by realleging the pertinent portions of Counts One and Three, the conspiracy counts, so when it speaks of "congressional committees," it realleges the previous identifications of the congressional committees.

The Indictment draws heavily on the Defense Appropriations Subcommittee's legislative oversight regarding the SINCGARS (walkie-talkie)[3] program. In particular, it alleges a 1988 letter by the House Defense Appropriations Subcommittee's Ranking Minority Member as the key[4] overt act in Count Three:

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[3] SINCGARS (Single Channel Ground and Airborne Radio System) is planned to be the Army's next generation of very high frequency combat radios, like the famous "walkie-talkies" of past wars.

[4] In what is otherwise largely a list of things allegedly provided to the defendant, like transportation from Washington to Philadelphia or from Scranton to Washington, this particular overt act sticks out

Continued

> 17. On or about June 7, 1988, defendant McDADE, wrote to the Secretary of the Army requesting that the Army delay in making a final decision on a possible "second source" for the SINCGARS program.

Indictment, Count Three, Overt Acts, para. 17 at 22. The Subcommittee functions through such correspondence, in the times between public and formal events like hearings and meetings.

In this letter, Representative McDade, as the Defense Appropriations Subcommittee's Ranking Minority Member, discusses the essence of the intent of committee legislative activity and its continuing legislative investigation. "The Committee has received interim reports from [the General Accounting Office,] GAO, and the Army has completed its source selection. However, the GAO's final report will not be completed until July 15th." House *amici* district court brief, Exhibit 1.[5] When the Indictment alleges that "defendant McDADE, wrote to the Secretary of the Army requesting that the Army delay in making a final decision," Indictment, Count Three, Overt Acts, para. 17 at 22, the prosecution means to show as criminal this writing.

> Our [Defense Subcommittee] intent throughout in monitoring the second source strategy and assigning a GAO review was to ensure this competition. . . . This was a key reason behind directing GAO to monitor the source selection process. . . . I strongly believe it would be a mistake to rush to contract award prior to the Committee's receipt and review of the GAO's findings.

House *amici* district court brief, Exhibit 1.

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sharply as something significant the defendant himself allegedly did as Ranking Minority Member. This particular overt act also echoes earlier ones alleged to be meetings on this subject. Indictment, Overt Acts, para. 9 at 21.

[5] The GAO serves as Congress's agent for legislative investigations. *Bowsher* v. *Synar*, 478 U.S. 714, 727–30, 737 (1986).

The GAO officially reported to the Defense Appropriations Subcommittee that the SINCGARS development program "has been plagued with production and reliability problems ever since the engineering development phase was bypassed in order to start initial production in fiscal year 1983." GAO, *Battlefield Automation: Army Command and Control Systems Acquisition Cost and Schedule Changes*, GAO/NSIAD–88–42FS at 19, December 1987.[6] Congress followed its Appropriations Committees' recommendations and deleted all but $10 million of the SINCGARS' $209 million budget request for fiscal year 1987.[7] In September 1987, the Army issued a request for a proposal to award a contract in May 1988 to a second source.

Throughout this developmental period, the Defense Appropriations Subcommittees maintained a continuing high level of bipartisan Congressional oversight over the SINCGARS program, because of its significance for military combat readiness, its high costs, and its plague of production and reliability difficulties. The multi-year legislative oversight process took on its typical forms: GAO reports, committee oversight hearings, reports, and correspondence, with the Count Three indicted Overt Act correspondence right in the middle of that process. That letter was written, as its discusses, because the GAO needed time to complete its pending study.[8] Broad Con-

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[6] This particular GAO report notes, on its first page, that it was prepared at the request of Chairman Bill Chappell, Jr. of the Defense Appropriations Subcommittee—not his Ranking Minority Member, the indicted Representative.

[7] At one point it was expected to cost in excess of $6.5 billion. The Army approved the requests for the radios in 1974 and advanced development began in 1978. Initial production contracts were awarded to ITT Corporation in 1983 and 1985. After the program experienced difficulties in first article testing in 1985 and continued to experience problems in fiscal year 1986, the Army cancelled progress payments to the contractor. *See* GAO reports cited *infra*.

[8] Between 1985 and 1988 GAO reported to the Appropriations Committees on the continuing and evolving SINCGARS program problems

Continued

gressional oversight interest in SINCGARS, going far beyond this particular Ranking Minority Member, has continued unabated to the present time.[9] With the Indictment focuses on so classic and major a Congressional oversight activity, this case squarely poses the issue of indicting a Member for his role in committee oversight.

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no less than five times. GAO, *Separate Army and Air Force Airborne SINCGARS Programs May Be Uneconomical*, GAO/NSIAD–85–50, January 31, 1985; GAO, *Battlefield Automation: Status of the Army Command and Control System Program*, GAO/NSIAD–86–184FS, August 1986 (requested by Chairman Ted Stevens and Chairman Bill Chappell, Jr.); GAO, *Battlefield Automation: Army Command and Control Systems Acquisition Cost and Schedule Changes*, GAO/NSIAD–88–42FS, December 1987 (requested by Chairman Bill Chappell, Jr.); GAO, *DOD Acquisition Programs: Status of Selected Systems*, GAO/NSAID–88–160, June 1988 (requested by Chairman Sam Nunn); GAO, *Combat Radios: Army's Selection of SINCGARS' Second-Source Contractor*, GAO/NSAID–88–200, July 1988 (requested by Chairman John C. Stennis and Chairman Bill Chappell, Jr.).

[9] GAO Reports: *Communication Acquisition: Army Still Needs to Determine Battlefield Communications Capability*, GAO/NSIAD–93–33 (November 1992) (requested by Chairman John P. Murtha); *1993 DOD Budget: Potential Reductions In Command, Control, and Communications Programs*, GAO/NSIAD–92–297BR (September 1992) (requested by Chairman Daniel K. Inouye and Chairman John P. Murtha); *Communications Acquisitions: Army Needs to Ensure Economy in SINCGARS Radio Procurement*, GAO/NSIAD–91–119 (June 1991) (requested by Chairman John P. Murtha); *Battlefield Automation: Army Tactical Command and Control System's Schedule and Cost*, GAO/NSIAD–91–118BR (April 1991); *Communications Acquisition: Issues Invoking Army's Single Channel Ground and Airborne Radio system* GAO/NSIAD–90–80BR (March 1990) (requested by Chairman Daniel K. Inouye and Chairman John P. Murtha).

Appropriations Hearings: *Department of Defense Appropriations for 1990, Hearings Before the Subcomm. on the Department of Defense of the House Comm. on appropriations*, 101st Cong., 1st Sess., Part 6, 95–97, 102–104, 110–112 (1989); *Department of Defense Appropriations for 1992, Hearings Before the Subcomm. on the Department of Defense of the House Comm. on Appropriations*, 102d Cong., 1st Sess., Part 6, 504–506 (1991); *Department of Defense Appropriations for 1993, Hearings Before the Subcomm. on the Department of Defense of the House Comm. on Appropriations*, 102d Cong., 2d Sess., part 4, 101–103 (1992).

Without repeating Representative McDade's statement of the procedural background of the appeal, it may be briefly noted that when the Third Circuit panel affirmed the district court's decision not to dismiss the Indictment, one judge dissented in part (Scirica, J.), (A-51 to A-61), and that four judges dissented from the denial of Representative McDade's petition for rehearing *en banc.* (A-159 to A-160).

SUMMARY OF ARGUMENT

It is well established that the Speech or Debate protection of a Member of Congress against being "questioned in any other Place" forbids indicting him for his legislative activity, including his legislative activity in committee. Gratuities and conspiracies can be alleged in indictments of Members, but only so long as the indictment and trial do not "question" that which is legislative. *United States* v. *Helstoski,* 442 U.S. 477, 489 (1979); *United States v. Johnson,* 383 U.S. 169, 178 (1966). Now, the Third Circuit has split with the Eleventh Circuit on the fundamental issue of whether a Member's committee role and oversight activity are legislative in nature, with the Third Circuit holding in this case that they are not legislative.

This case warrants review for two reasons. The Court should resolve a split in the Circuits on a fundamental question of importance regarding the Congress's constitutional protections. Moreover, this Court should reinforce the protection given to Congressional oversight. *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491 (1975).

REASONS FOR GRANTING THE WRIT

1. The Third Circuit has Split with the Eleventh Circuit Regarding an Important Constitutional Question Concerning the Separation of Powers.

In *United States* v. *Helstoski,* 442 U.S. 477, 489 (1979), and *United States* v. *Johnson,* 383 U.S. 169, 178 (1966), this Court firmly established that the Speech or Debate Clause protection for Members of Congress, while allow-

ing indictments for gratuities and conspiracies, forbids use in such indictments of matters that are legislative in nature. The Speech or Debate Clause, art. I, §6, cl. 2 provides that "for any Speech or debate in either House, they [the Senators and Representatives] shall not be questioned in any other Place." Numerous Supreme Court cases have elucidated that the protection for "either House" includes the committees of either House. The Clause protects "the deliberative and communicative processes by which Members participate in *committee* and House proceedings with respect to the consideration and passage or rejection of proposed legislation. . . ." *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491, 504 (1975) (emphasis added) (quoting *Gravel* v. *United States,* 408 U.S. 606, 625 (1972)). It is a well established Speech or Debate principle that "committee reports are also protected." *Hutchinson* v. *Proxmire,* 443 U.S. 111, 124 (1979); *accord, Doe* v. *McMillan,* 412 U.S. 306, 311 (1973); *Gravel* v. *United States,* 408 U.S. at 617.[10]

Accordingly, the Eleventh Circuit, in the case of Representative Swindall, *United States* v. *Swindall,* 971 F.2d 1531 (11th Cir. 1992), *cert. denied,* 114 S.Ct. 683 (1994), correctly followed this Court's principles regarding the fundamental constitutional principle protecting Congressional committees. *Swindall* held that "Speech or Debate" does not "allow reference to be made to [the Member's] committee memberships both in grand jury proceeding and at trial. . . ." 971 F.2d at 1543.[11] As the statement

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[10] *See, e.g., Eastland,* 421 U.S. at 501–502 (committee investigations protected) ("Without exception, [the Supreme Court has] read the Speech or Debate Clause broadly to effectuate its purposes;" 408; *Gravel, 408 U.S. at 617* (committee hearings protected) (the Supreme Court has "plainly not taken a literalistic approach in applying the privilege").

[11] *Swindall* reversed three counts on which Representative Swindall had been convicted, because the prosecution had used his committee membership against him. The Department of Justice accepted the validity of the rule laid down, neither seeking rehearing nor petitioning for certiorari. Representative Swindall himself sought unsuccessfully

of the case lays out, this indictment of Representative McDade directly, broadly, and strongly violated *Swindall.* Each and every one of the indictment's five counts specifically alleges and relies on the Congressman's role as Ranking Minority Member on the House Subcommittee on Defense Appropriations and the House Small Business Committee.[12] No attempt was made by the indictment to charge only the receipt of gratuities, the conspiratorial communications, and the like, and to omit Representative McDade's role as committee Ranking Minority Member. On the contrary, both the district court and the panel unequivocally found that the prosecution would rely on Representative McDade's committee role.[13]

The Third Circuit expresses bluntly its readiness to split with the Eleventh Circuit over the *Swindall* principle. It starts by reprinting at length what *Swindall* says. *See, e.g.,* A–18 to A–19 (quoting *Swindall,* 971 F.2d at 1543):

> There are two reasons why the Speech or Debate Clause prohibits inquiry into a member of Congress committee assignments even if the member's specific legislative acts are not mentioned. First, our review of Supreme Court precedent convinces us that the privilege protects legislative status as well as legislative Acts.

After discussing *Swindall* at length, A–18 to A–19, the panel makes some attempts to characterize what it is refusing to follow in that opinion, but ultimately concludes

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rehearing and certiorari, on issues involving the other counts in his case regarding which his committee memberships had not been used.

[12] If anything, *Swindall* presented less patent error than the prosecution's case now. In fact, the *Swindall* Indictment did not even *mention* Representative Swindall's committee status. "None of the ten counts of the Indictment referred directly to Swindall's committee memberships, however." 971 F.2d at 1540.

[13] The district court order noted: "The indictment itself includes references to Mr. McDade's committee positions, and the government admits that it intends to prove that Mr. McDade was able to use his status as the ranking minority member on two House committees. . . ." (A–70). The appellate panel recognized that "in this case the indictment relies on the defendant's committee status. . . ." (A–24).

the lengthy Part III of its opinion by holding that "If . . . [the *Swindall*] court meant to embrace the proposition that the Speech or Debate Clause broadly prohibits proof of legislative or committee status, we would be compelled, for the reasons already explained, to disagree." (A–26).

It requires little exegesis to show the exceptional importance of the Third Circuit's decision in Representative McDade's case to disagree with the Eleventh Circuit's decision in Representative Swindall's case. First, the issue itself concerns not some mere detail of statutory interpretation or even of constitutional penumbra, nor some narrow rule among the multitude that govern the broad range of governmental actions. This is an aspect of constitutional law going to the heart of the separation of powers, concerning a direct clash between the Executive and Legislative Branches over whether the Executive Branch can use the Members' role in committees—the chief structure of the Congress—to indict them.

As explained in a much-quoted passage in *United States* v. *Johnson,* 383 U.S. 169, 178 (1966), the Speech or Debate "privilege has been recognized as an important protection of the independence and integrity of the legislature" and as "reinforcing the separation of powers so deliberately established by the Founders." Its highest function is "protecting against possible prosecution by an unfriendly executive" as "one manifestation of the 'practical security' for ensuring the independence of the legislature." *Id.* at 179. The split created by the Third Circuit is located where the Executive Branch can exercise the greatest intimidation against Members of Congress, by multi-count felony indictments pervasively utilizing the offending matter. It leaves the Congress in the untenable situation that whether its Members are protected in their committee role depends on the Circuit in which they might be indicted, sued, subpoenaed, or otherwise subjected to being "questioned in any other Place."

The reasons suggested by the Third Circuit for upholding the use made of Representative McDade's committee

role are not reasons to view lightly the damage done to the separation of powers. It does not matter whether the stated purpose for indicting a Member regarding his committee role is to prove someone's "state of mind." This issue in this case is not the hearsay rule; a Member has been "questioned in any other Place" once he is indicted, regardless of the purpose of the indicting. Equally, it does not matter whether the prosecutor declares the Congressional committee to be a "victim," with the indictment as a way of saving or helping the Congress. The Speech or Debate protection never depended on the Executive Branch's avowals of desires to assist the Legislative Branch, but on the crossing of the constitutional lines meant to protect the Congress. Once Members of Congress must consider the law to be that a grand jury could use their committee role against them, exposing them for that committee role to multi-count felony and RICO indictments, they must consider themselves divested of a key element of the protection of the Speech or Debate Clause.

A split in the circuits over a question of this importance warrants resolution by this Court.

2. This Court Should Repair the Damage Done to the Protection For Congressional Oversight.

This Court has recognized the vital importance for the constitutional and democratic operation of government for Congressional oversight to receive its constitutional protection, and this case warrants review to reinforce that protection. As the Court held in *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491, 505 (1975), "To conclude that the power of inquiry is other than an integral part of the legislative process would be a miserly reading of the Speech or Debate Clause in derogation of the 'integrity of the legislative process.'" This Court has often described the high importance of that investigative oversight process.

For example, in *Sinclair* v. *United States,* 279 U.S. 263, 297–98 (1929), a Senate committee, like the Defense Ap-

propriations Subcommittee here probing SINCGARS, was investigating a defense department (in *Sinclair*, the Navy), and like the Defense Appropriations Subcommittee, the *Sinclair* committee's focus of questioning was whether the Navy had been carrying out the law or going a wasteful way of its own. The Court sustained completely such constitutional oversight by a Congressional committee:

> The question propounded was within the authorization of the committee and the legitimate scope of investigation to enable the Senate to determine whether the powers granted to or assumed by the Secretary of the Interior and the Secretary of the Navy should be withdrawn, limited, or allowed to remain unchanged.

Id. at 298. The Court in *Sinclair* thus approved the validity of committee oversight by a committee, holding that "'the two Houses of Congress, in their separate relations, possess not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective,'" *Id.* at 291 (*quoting McGrain* v. *Dougherty*, 273 U.S. 135, 173 (1929)). The *Sinclair* Court recognized that "the power of inquiry is an essential and appropriate auxiliary to the legislative function." *Id.*

Indeed, the Supreme Court has long recognized that "[t]he power of the Congress to conduct investigations is inherent in the legislative process." *Watkins* v. *United States*, 354 U.S. 178, 187 (1957). *Watkins* stated that:

> That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. . . . It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.

Id.[14] Nowhere do "inquiries concerning the administration of existing laws" involve a subject more important to

[14] The Court in *Watkins* saw the fundamental "danger to effective and honest conduct of the Government if the legislature's power to

the national security and the proper use of the resources appropriated for that security than in the annual cycle of oversight of defense appropriations. At the center of a Congressional committee's constitutional oversight task is the work of the Defense Appropriations Subcommittee addressed in this Indictment, namely, the Subcommittee's inquiries as to whether a department, such as the Defense Department, is carrying out recent laws.

Part of what drove the sharp division in the Third Circuit—the four judges who voted for rehearing *en banc,* and the division in the panel—may well have been the recognition of the injury to Congressional oversight from the decision of the divided panel. Two judges (Alito, J., and Bassler, D.J.) had refused even to consider a key aspect of the appeal—the Representatives's acts of oversight—but one Judge (Scirica, J.) dissented at length on this issue as well as voting with three other judges to grant rehearing *en banc.* As Judge Scirica explained:

> I would hold that true legislative oversight falls within the protection of the Speech or Debate Clause. . . . [W]e have jurisdiction to decide whether overt acts in the indictment violate the Speech or Debate Clause. . . .
>
> The majority holds that jurisdiction to determine whether overt acts challenged on Speech or Debate grounds should be stricken "does not satisfy the requirement that the right at issue . . . be jurisdictionally 'important'". . . . I respectfully disagree.

(A–52).

As Judge Scirica explains, Congressional oversight serves a vital and constitutionally protected purpose:

> Generally speaking, oversight is the way Congress evaluates legislation, and in the appropriate manner, monitors the operations of executive departments and agencies. Properly done, oversight is part of our system of checks and balances. The term covers a range of formal and informal activities, of which some may be privileged.

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probe corruption in the executive branch were unduly hampered." *Id.* at 194–95.

(A–56). Judge Scirica explained the importance of judicial review to protect against such inclusion of Speech or Debate matter in the indictment. (A–52 to A–61). Such protection was "the conscious choice of the Framers' buttressed and justified by history." (A–60 to A–61) (dissenting opinion (quoting *Eastland,* 421 U.S. at 510) (quoting, in turn, *United States* v. *Brewster,* 408 U.S. 501, 516 (1972)).

Helstoski v. *Meanor*, 442 U.S. 50, 508 (1979) stated that "[i]f a Member 'is to avoid *exposure* to [being questioned for acts done in either House] and thereby enjoy the full protection of the [Speech or Debate] Clause his . . . challenge . . . must be reviewable before . . . exposure . . . occurs.' *Abney, supra*, 431 U.S. at 662, 97 S.Ct. 2042." In allowing Members a pre-trial appeal, this Court reasoned:

> We agree that the guarantees of that Clause are vitally important to our system of government and therefore are entitled to be treated by the courts with the sensitivity that such important values require.

Helstoski, 442 U.S. at 506. In this case, while the Representative, the *amici*, the dissent, and even the prosecution [15] all recognized that *Helstoski* v. *Meanor* necessitates that Congress receive the protection of such pretrial review of the indictment for such acts of legislative oversight, the divided panel refused to do so. Instead, it held:

> The question whether the two overt acts should have been stricken . . . does not satisfy the requirement that the right at issue in a collateral order appeal must be jurisprudentially "important". . . .

(A–48). The divided panel chose this method for overlooking that patent flaw in the Indictment, a flaw that the prosecution all but conceded to exist. (A–55, n.3) (dissent-

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[15] The majority noted the prosecution's position when observing: "the parties and the amici in this case seem to assume" that this "ruling under the Speech or Debate Clause is appealable," (A–47).

ing opinion). Exploitation of this new doctrine would allow prosecutors most of what this Court's *Helstoski* decisions meant to preclude.

CONCLUSION

This case presents issues of fundamental importance to Congress and the separation of powers, on which the circuits have split and vital doctrines of this Court have been undermined. For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1994

JOSEPH M. McDADE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Speech or Debate Clause of the Constitution precluded trial of petitioner on each of the counts of the indictment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
Conclusion	22

TABLE OF AUTHORITIES

Cases:

DiBella v. *United States*, 369 U.S. 121 (1962)	19
Eastland v. *United States Servicemen's Fund*, 421 U.S. 491 (1975)	16
Gravel v. *United States*, 408 U.S. 606 (1972)	16, 17
Helstoski v. *Meanor*, 442 U.S. 500 (1979)	5, 19
United States v. *Biaggi*, 853 F.2d 89 (2d Cir. 1988), cert. denied, 489 U.S. 1052 (1989)	8
United States v. *Brewster*, 408 U.S. 501 (1972)	5, 6, 7, 10, 11, 12, 15, 17, 18
United States v. *Dixon*, 113 S. Ct. 2849 (1993)	21
United States v. *Helstoski*, 442 U.S. 477 (1979)	10, 11
United States v. *Johnson*, 383 U.S. 169 (1966)	15
United States v. *Loyd*, 743 F.2d 1555 (11th Cir. 1984)	21
United States v. *Myers*, 635 F.2d 932 (2d Cir.), cert. denied, 449 U.S. 956 (1980)	18
United States v. *Ragins*, 840 F.2d 1184 (4th Cir. 1988)	20-21
United States v. *Swindall*, 971 F.2d 1531 (11th Cir. 1992), cert. denied, 114 S. Ct. 683 (1994)	6, 13, 14

Constitution and statutes:

U.S. Const.:	
Art. I, § 6, Cl. 1 (Speech or Debate Clause)	*passim*
Amend. V (Double Jeopardy Clause)	20, 21
18 U.S.C. 201(b)(2)	13
18 U.S.C. 201(c)(1)(B)	2, 3, 4
18 U.S.C. 201(g) (1982)	2

Statutes—Continued: Page

18 U.S.C. 371 ..... 2, 9
18 U.S.C. 1956 13
18 U.S.C. 1962(c) 2
31 U.S.C. 5324 13

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A61) is reported at 28 F.3d 283. The opinion of the district court (Pet. App. A62-A158) is reported at 827 F. Supp. 1153.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1994. A petition for rehearing was denied on August 9, 1994. Pet. App. 159a-160a. The petition for a writ of certiorari was filed on November 7, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a Member of the United States House of Representatives, was indicted in the United States District Court for the Eastern District of Pennsylvania on two counts of conspiring to defraud the United States of his honest services and to seek and accept illegal gratuities (Counts 1 and 3), in violation of 18 U.S.C. 371; two counts of accepting illegal gratuities (Counts 2 and 4), in violation of 18 U.S.C. 201(c)(1)(B) (formerly 18 U.S.C. 201(g) (1982)); and one count of racketeering (Count 5), in violation of 18 U.S.C. 1962(c) (RICO). Petitioner moved to dismiss the indictment under the Speech or Debate Clause of the Constitution, Art. I, § 6, Cl. 1. The district court denied the motion. On interlocutory appeal under the collateral order doctrine, the court of appeals affirmed.

1. The indictment identified petitioner as a Member of the House of Representatives who became the "ranking minority member of the House Small Business Committee" in 1982, and the "ranking minority member of the House Appropriations Committee, Subcommittee on Defense Appropriations," in 1985. C.A. App. 45-46.

Count 1 alleged that petitioner conspired to defraud the United States of its right to his honest services as a Member of Congress and to seek, accept, and receive illegal gratuities from a small business named United Chem Con Corporation (UCC), in violation of 18 U.S.C. 371. C.A. App. 46, 49-50. In particular, the indictment alleged, petitioner agreed to solicit and accept "sham campaign contributions, free aircraft transportation," and other things of value, "in return for his influence and * * * his support for UCC's interests in obtaining and maintaining UCC's government contracts and Small Business Administration program eligibility." *Id.* at 50.

The indictment identified 47 overt acts carried out in furtherance of the conspiracy charged in Count 1. C.A. App. 51-58. Those overt acts included petitioner's "caus[ing] a letter to be directed to the Secretary of the Navy warning that the Navy's decision to issue a 'stop work' order on UCC's * * * production [of Navy "Sea Shed" cargo containers] would be viewed by [petitioner] with 'extreme gravity.'" *Id.* at 54 (overt act 16). The overt acts also included petitioner's acceptance of numerous things of value, including sham campaign contributions, free air transportation and lodging at resorts on three occasions, and free air transportation on many other occasions, frequently in private planes. Among them were petitioner's acceptance of "free private round-trip aircraft transportation from UCC from Washington, D.C. to Scranton, Pennsylvania" on May 6, 1987. *Id.* at 58 (overt act 43). Count 2 charged a substantive violation of 18 U.S.C. 201(c)(1)(B) based on petitioner's acceptance of that free air transportation. C.A. App. 59.

Count 3 charged a similar conspiracy involving several defense contractors, including the Grumman Corporation and the Sperry Corporation. Petitioner allegedly "would and did solicit, receive and accept sham campaign contributions, 'scholarship' checks, free private aircraft transportation," and other illegal gratuities "in return for his influence and * * * his support for Grumman and Sperry's interests in maintaining and obtaining government contracts." C.A. App. 63. The indictment identified 18 overt acts carried out in furtherance of the conspiracy. *Id.* at 64-66. Those overt acts included petitioner's writing "to the Secretary of the Army requesting that the Army delay in making a final decision" in awarding a "second source" contract for an Army radio system. *Id.* at 66

(overt act 17). The overt acts also included his acceptance of numerous things of value, including checks for his son's college expenses, sham campaign contributions, free air transportation and lodging at a resort, and "free air transportation from Grumman from Washington, D.C. to Philadelphia, Pennsylvania and then from Philadelphia, Pennsylvania to Scranton, Pennsylvania" on July 15, 1988. *Ibid.* (overt act 18). Count 4 charged a substantive violation of 18 U.S.C. 201(c)(1)(B) based on petitioner's acceptance of that free air transportation. C.A. App. 67.

Finally, Count 5 charged petitioner with conducting and participating in a RICO enterprise. The enterprise was identified as an association in fact, consisting of petitioner's "Congressional offices in Washington, D.C., and in the 10th Congressional District of Pennsylvania," and the individuals who worked for petitioner in those offices and who worked at his direction as staff members of the congressional committees on which petitioner held positions. C.A. App. 68. The object of the alleged racketeering activity was to "use [petitioner's] Office as a vehicle to solicit and receive bribes and illegal gratuities * * * from various defense contractors and lobbyists." *Id.* at 69.

2. Petitioner moved to dismiss the indictment on the ground that it violated the Speech or Debate Clause of the Constitution. He claimed that the conduct alleged in the indictment consisted of protected "legislative" conduct for which he could "not be questioned" outside of Congress itself. In particular, he claimed that his status as a member of congressional committees was protected and could not be alleged in the indictment. See C.A. App. 142-154. He also claimed that, "because many of the allegations in the indictment involve legislative acts and motivations, the Speech or Debate Clause prevents the

government from forcing [petitioner] to defend himself based on those actions and motivations." *Id.* at 104.

The district court denied petitioner's motion to dismiss. Pet. App. A62-A158. The court held that "[t]he Speech or Debate Clause was not intended to immunize members of Congress from criminal or civil prosecution merely because of their status. * * * Simply being a member of Congress or a committee member is not a [protected] legislative act." *Id.* at A89. The court also held that petitioner was entitled to introduce evidence of legislative acts in his own defense, but that "[t]he government is not forcing [petitioner] to waive his legislative privilege or introduce evidence of his legislative acts in this case." *Id.* at A86.

3. Petitioner took an interlocutory appeal under the collateral order doctrine. See *Helstoski* v. *Meanor*, 442 U.S. 500, 506-508 (1979). The court of appeals affirmed. Pet. App. A1-A61.

a. First, the court rejected petitioner's contention that the indictment had to be dismissed because it referred to his position as ranking minority member of both the House Subcommittee on Defense Appropriations and the House Small Business Committee. Citing this Court's decision in *United States* v. *Brewster*, 408 U.S. 501 (1972), the court noted that it is "well settled—and it is conceded by [petitioner]—that the Speech or Debate Clause does not prohibit proof of a defendant's status as a member of the United States Senate or House of Representatives." Pet. App. A10 (footnote omitted). The court concluded that the Speech or Debate Clause provides no greater protection for petitioner's status as a member of a congressional committee. That conclusion was particularly appropriate, the court explained, because the text of the Speech or Debate Clause refers to "Senators and

Representatives" and "confers rights on members of Congress in their capacity as members," not based on "membership on a congressional committee." *Id.* at A15. Finally, the court noted that the indictment in *Brewster*, which was upheld by this Court against a Speech or Debate Clause challenge, had referred to Senator Brewster's membership on a Senate committee. *Id.* at A16 (citing *Brewster*, 408 U.S. at 502; *id.* at 529 (Brennan, J., dissenting)).

In concluding that the indictment was not defective because it referred to petitioner's status as a member of congressional committees, the court of appeals distinguished the Eleventh Circuit's decision in *United States* v. *Swindall*, 971 F.2d 1531 (1992), cert. denied, 114 S. Ct. 683 (1994), which held that certain counts of an indictment that referred to the defendant's membership on a congressional committee violated the Speech or Debate Clause. The court of appeals acknowledged that the opinion in *Swindall* stated that "the privilege [of the Speech or Debate Clause] protects legislative status as well as legislative acts." Pet. App. A19 (quoting *Swindall*, 971 F.2d at 1543). But the court explained that the point of that statement was that "the distinction between legislative 'status' and legislative 'activity' is not dispositive for Speech and Debate Clause purposes." *Id.* at A21. As the court of appeals explained, the basis of the decision in *Swindall* was that the Speech or Debate Clause would be violated "if prosecutors could inquire into a member's committee status *for the purpose of showing that the member had acquired knowledge of the contents of the bills considered by his or her committees*." *Id.* at A21-A22. Since the indictment in this case "does not recite * * * [petitioner's] committee memberships or positions for the purpose of establishing that he thereby acquired knowledge of bills under

consideration by the committee," the court concluded that "*Swindall's* holding regarding legislative status is inapplicable" in this case. *Id.* at A23.

b. The court of appeals also rejected petitioner's claim that the indictment required him to introduce evidence of protected legislative acts in his own defense. The court reasoned that the text of the Speech or Debate Clause "protects a member of Congress from being 'questioned,' and a member is not 'questioned' when he or she chooses to offer rebuttal evidence of legislative acts." Pet. App. A26-A27. Moreover, the court found petitioner's claim "contrary to the clear implication of" *Brewster*. *Id.* at A27. Noting that *Brewster* had involved a bribery indictment, the court explained that "[s]uch a charge * * * often makes it tactically advantageous for a member to respond with proof of his or her legislative acts." *Ibid.*

c. The court of appeals also rejected petitioner's claim that the RICO charge against him was invalid because the government could not prove the existence of the RICO enterprise without proving that petitioner performed legislative acts. Pet. App. A29. The court held that the government would be able to establish the RICO enterprise "by proof relating to *official* but (for Speech or Debate Clause purposes) non-legislative acts." *Id.* at A31. The court explained that "the Clause does not shield 'a wide range of legitimate "errands" performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called "news letters" to constituents, news releases, and speeches delivered outside the Congress.'" *Id.* at A31-A32 (quoting *Brewster*, 408 U.S. at 512). In addition, the court held, "the prosecution may also be able to prove the existence of the enterprise in question by evidence relating

to unofficial or ultra vires conduct." *Id.* at A32. Introduction of such evidence would not violate the Speech or Debate Clause. *Ibid.*

d. Finally, the court of appeals rejected petitioner's claim that the district court should have dismissed the entire indictment because it was vague or because there was uncertainty as to whether certain allegations concerned legislative or purely political acts.

First, the court determined that the Speech or Debate Clause did not require dismissal of any part of the indictment for vagueness. The court explained that the Clause imposes no special pleading requirements and that the 43-page indictment was sufficiently detailed to provide adequate notice of the nature of the charges. Pet. App. A38-A39.

Second, the court found it unnecessary for the district court to conduct a pretrial hearing, based on special and detailed allocations of the burden of proof and of production, to ascertain whether certain of the charges in the indictment should have been dismissed because they were based on conduct protected by the Speech or Debate Clause. No hearing or other procedure was needed, the court held, with respect to either of the two categories of allegations—travel and Executive Branch contacts—that petitioner claimed were so vague as to require pretrial proceedings.

Relying on the Second Circuit's opinion in *United States* v. *Biaggi*, 853 F.2d 89, 104 (1988), cert. denied, 489 U.S. 1052 (1989), the court held that "travel by a member of Congress to or from a location where the member performs legislative acts is not itself protected by the Speech or Debate Clause." Pet. App. A40-A41. Thus, Counts 2 and 4 (based on petitioner's air travel as alleged in overt act 43 of Count 1 and overt act 18 of Count 3,

respectively) did not violate the Clause. Petitioner does not appear to challenge that holding before this Court.

The court of appeals did not reach petitioner's claim that his contacts with the Secretaries of the Navy and Army, as charged in overt act 16 of Count 1 and overt act 17 of Count 3, were protected activities pertaining to legislative "oversight" of the Executive Branch. First, because a conspiracy charge under 18 U.S.C. 371 need only allege a single overt act, the court concluded that, "[e]ven if * * * both of the overt acts in question are invalid, no charge in the indictment would have to be dismissed" because the indictment alleged numerous other overt acts. Pet. App. A46. Second, the question whether the overt acts should be stricken from the indictment would have no "evidentiary significance," *id.* at A48, since it would have no bearing on whether the government would attempt to prove them, or would be permitted to prove them, at trial, *id.* at A49. Accordingly, having determined that no count in the indictment had to be dismissed, the court reasoned that the only remaining issue was simply whether certain evidence, which the government may or may not attempt to introduce at trial, would be inadmissible under the Speech or Debate Clause. That issue, the court held, was not properly before it because "a ruling on the admissibility of evidence at a criminal trial is not completely separate from the merits of the case," *id.* at A50, and therefore would not be appealable under the collateral order doctrine, *id.* at A50-A51.

4. Judge Scirica dissented in part (Pet. App. A51-61), explaining that he believed that the court had "jurisdiction to decide whether overt acts in the indictment violate the Speech or Debate Clause" and that "one of the overt acts here may be privileged." *Id.* at A52. Judge Scirica stated that he would "require the

district court to determine prior to trial whether the overt acts violate the Clause." *Id.* at A61. In "all other respects," Judge Scirica "fully join[ed] the majority opinion." *Id.* at A52.

ARGUMENT

Petitioner claims (Pet. 7-23) that the court of appeals erred in refusing to dismiss any part of the indictment for violation of the Speech or Debate Clause, in refusing to strike portions of the indictment proof of which would in his view violate the Speech or Debate Clause, and in refusing to require the district court to institute procedures to screen the evidence in advance of trial to ensure that he had a pretrial opportunity to appeal any erroneous evidentiary rulings concerning the Speech or Debate Clause. None of those claims warrants this Court's review.

1. a. Petitioner argues (Pet. 14) that the indictment charges conduct directly protected by the Speech or Debate Clause, because it alleges that petitioner was the "ranking minority member of the House Appropriations Committee, Subcommittee on Defense Appropriations." C.A. App. 2.

The court of appeals correctly held that reference to, or proof of, petitioner's membership on a congressional committee does not violate the Speech or Debate Clause. This Court's decisions in *United States* v. *Brewster*, 408 U.S. 501 (1972), and *United States* v. *Helstoski*, 442 U.S. 477 (1979), establish that the Speech or Debate Clause does not forbid the prosecution of a Member of Congress for taking bribes. As this Court explained in *Brewster*, the controlling inquiry is "whether it is necessary to inquire into how [the defendant] spoke, how he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation of [the statute

under which he was indicted]." 408 U.S. at 526.[1] Where a bribe is charged, an allegation of the reasons why it was offered—*i.e.*, an allegation that the defendant held a position as a Member of Congress or of a congressional committee—"does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them." *Ibid.* So long as the government does not attempt to show how the defendant "acted, voted, or decided," the bribery charge can stand. *Id.* at 527. See also *United States* v. *Helstoski*, 442 U.S. at 487-489.

In *Brewster*, the Court applied those standards to reverse the dismissal of an indictment on Speech or Debate Clause grounds. The indictment charged that the defendant, a former Senator, had accepted bribes in exchange for being influenced in the performance of official acts in his capacity as a Member of the Senate and of a Senate committee. Indeed, as the court of appeals in this case noted (Pet. App. A16), the indictment in *Brewster* specifically referred to the defendant's service on a Senate committee. See 408 U.S. at 502; *id.* at 529 (Brennan, J., dissenting). Nonetheless, this Court

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[1] The Court repeated numerous times in *Brewster* that the dispositive question is whether the indictment requires inquiry into such "legislative acts." See 408 U.S. at 512 ("a Member of Congress may be prosecuted under a criminal statute provided that the Government's case does not rely on legislative acts or the motivation for legislative acts"); *id.* at 525 ("Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts"); *id.* at 526 ("[t]aking a bribe is, obviously, * * * not a legislative act" nor "is inquiry into a legislative act or the motivation for a legislative act necessary to a prosecution under this statute or this indictment"); *id.* at 528 (refusing to "retreat from the Court's position in [*United States* v. *Johnson*, 383 U.S. 169 (1966)] that a Member may be convicted if no showing of legislative act is required").

reversed the district court's dismissal of the indictment, on the ground that the charge that the defendant, when he was a Senator, had solicited and received bribes to perform official acts did not require proof that the defendant in fact fulfilled his promise to perform those legislative acts in return for the bribe. *Brewster*, 408 U.S. at 527; see Pet. App. A11-A13.

That holding controls this case. The indictment alleges that petitioner was a member of two House committees, but does not refer to, or require proof of, any actual committee work or other legislative activity, such as voting or consideration of particular bills. As in *Brewster*, the reference to petitioner's position as a committee member merely establishes petitioner's official position and thereby makes clear the purpose for which the gratuity was offered. Accordingly, proof of the allegation of petitioner's membership on the committee does not require any inquiry that would be forbidden by the Speech or Debate Clause.

In any event, as the court of appeals recognized (Pet. App. A15-A16), petitioner's argument that the indictment could not allege any facts about his membership on a congressional committee is inconsistent with the undisputed principle that "the Speech or Debate Clause permits proof of a defendant's status as a member of Congress." *Id.* at A14.[2] There is no basis in the text or

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[2] Petitioner appears to recognize that this Court held in *Brewster* that, at a minimum, an indictment may allege that the defendant was a member of Congress without violating the Speech or Debate Clause. But he attempts to distinguish *Brewster* on the ground that, "while membership in Congress is a necessary element of the crimes charged in *Brewster* * * *, committee membership is not a necessary element to be proven in any crime." Pet. 12. The indictment in *Brewster*, however, alleged not only the defendant's status as a Member of Congress, but also

purposes of the Speech or Debate Clause or in any decision of this Court to accord greater protection to petitioner's role on a congressional committee than to his membership in Congress. So long as the reference to the defendant's official position does not substitute for or otherwise require an inquiry into his actual legislative acts, it is permissible under the Speech or Debate Clause.

b. Petitioner asserts (Pet. 20-23) that the court of appeals' holding that the Speech or Debate Clause does not bar proof of petitioner's membership on a congressional committee conflicts with the Eleventh Circuit's decision in *United States* v. *Swindall*, 971 F.2d 1531 (1992), cert. denied, 114 S. Ct. 683 (1994).

The court of appeals carefully examined the basis of the Eleventh Circuit's decision in *Swindall* and correctly concluded that the holding of *Swindall* is consistent with the court of appeals' analysis in this case. In *Swindall*, the defendant, a Congressman who sat on two committees that considered legislation on money laundering and structuring of financial transactions, 18 U.S.C. 1956 and 31 U.S.C. 5324, was charged with making false statements to a grand jury. Some of those statements related to Swindall's knowledge that certain financial transactions would violate the above-noted statutes. The Eleventh Circuit

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his committee membership. Moreover, membership in Congress is not a "necessary element" of the bribery charge in *Brewster*; the statute requires only status as a "public official." 18 U.S.C. 201(b)(2). Finally, *Brewster* does not imply that the Speech or Debate Clause is rendered inapplicable if protected acts are "necessary elements" of a particular bribery charge. Rather, the decision in *Brewster* indicates that status alone is *not* protected where it is used to demonstrate the purpose for which a bribe was offered.

reversed Swindall's convictions on the counts based on those statements, because it found that the government had sought to establish Swindall's knowledge concerning the scope of the federal statutes at issue by reference to his legislative activities—*i.e.*, his reading of certain legislation or committee reports and discussing the legislation with members of his congressional staff.

As the court of appeals in this case observed (Pet. App. A19), the opinion in *Swindall* stated that "the privilege [of the Speech or Debate Clause] protects legislative status as well as legislative acts." *Swindall*, 971 F.2d at 1543. But the point of that statement was that "the distinction between legislative 'status' and legislative 'activity' is not dispositive for Speech and Debate Clause purposes." Pet. App. A21.[3] Indeed, the Eleventh Circuit in *Swindall* explained that the key question is not whether "status" or "acts" are at issue, but whether the indictment requires an inquiry that would "directly impinge on or threaten the legislative process," "make legislators accountable before a possibly hostile judiciary," or "indirectly impair legislative deliberations." 971 F.2d at 1545. Having found that the inquiry into committee membership in *Swindall* would have had all three effects, the court held that the counts at issue in that case had to be dismissed.

The crucial fact for the Eleventh Circuit in *Swindall* was that the proof of the defendant's membership on the committee in that case was a surrogate for proof of the defendant's specific legislative acts—*i.e.*, his review of bills that came before the committee. Pet. App. A21-A23; *Swindall*, 971 F.2d at 1545. In this case, by contrast, the

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[3] Petitioner purports to agree with that interpretation of *Swindall*. See Pet. 21 (decision in *Swindall* not based on "static categories of 'status' and 'acts'").

indictment set forth petitioner's membership in Congress and on certain committees to demonstrate that others had a reason to offer him a gratuity, not to show that he performed any specific legislative acts. Pet. App. A22-A23. Because the reason for proving petitioner's membership on congressional committees does not involve any inquiry into specific legislative acts, the Eleventh Circuit's holding in *Swindall* is consistent with the Third Circuit's decision here.

2. Petitioner asserts (Pet. 14) that the court of appeals "held that [contact with the Executive Branch] always falls outside the protected legislative sphere" under the Speech or Debate Clause. That is incorrect. The court of appeals expressly recognized that certain types of contacts with Executive Branch officials, such as committee hearings, clearly fall within the core of protected legislative activities, while other contacts are just as clearly not protected. Pet. App. A43-A44;[4] see *Brewster*, 408 U.S. at 512; *United States* v. *Johnson*, 383 U.S. 169, 172 (1966). The court recognized that it is unclear whether activities falling between those two extremes, such as certain informal communications with Executive Branch officials, are protected. Pet. App. A44.

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[4] The court explained that legislative "oversight" of the Executive Branch includes both protected and unprotected acts (Pet. App. A44, citations omitted):

> Activities at one end of this spectrum, such as committee hearings, are clearly protected by the Speech or Debate Clause. Activities at the other end of the spectrum, such as routine casework for constituents, are just as clearly not protected. Whether the Speech or Debate Clause shields forms of 'oversight' falling between these extremes — for example, letters or other informal communications to Executive Branch officials from committee chairmen, ranking committee members, or other committee members — is less clear.

Petitioner's claim that the court of appeals held that such contact "always" is unprotected by the Speech or Debate Clause is unfounded.

Petitioner also contends (Pet. 8-14) that the court of appeals failed to follow decisions of this Court, *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975), and *Gravel* v. *United States*, 408 U.S. 606 (1972), which hold that the committee process and legislative oversight are core legislative activities that are protected under the Speech or Debate Clause.

The court of appeals' decision is consistent with this Court's decisions in *Eastland* and *Gravel*. In *Eastland*, the Court held that the issuance of a subpoena by a Senate subcommittee in the course of an investigation is protected activity. 421 U.S. at 504-507. In *Gravel*, the Court recognized that a member's conduct at legislative committee hearings is within the sphere of protected legislative activity. 408 U.S. at 624. No count of the indictment requires proof that petitioner engaged in either of the activities at issue in *Eastland* and *Gravel*—issuance of a committee subpoena or participation in committee hearings. Nor does any count require proof more generally of legislative acts undertaken by petitioner as a committee member or officer. Indeed, the court of appeals' decision follows directly from the standard articulated by this Court in *Gravel*: that to be protected under the Speech or Debate Clause, a member's activities "must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." 408 U.S. at 625.

3. Petitioner claims (Pet. 15) that proof of the RICO "enterprise" charged in the indictment "would absolutely require the sort of proof of the legislative process that the [Speech or Debate] Clause forbids."

Proof of the RICO "enterprise" in this case would not require any inquiry into matters protected by the Speech or Debate Clause. The RICO "enterprise" consisted of petitioner and the employees he supervised in his Washington office, on his committee staffs, and in his Pennsylvania office. As the court of appeals explained, it is possible to prove the RICO offense with evidence limited to non-protected official acts, Pet. App. A30-A31; see *Brewster*, 408 U.S. at 512, and to "evidence relating to unofficial or ultra vires conduct that is separate from the pattern of racketeering activity," Pet. App. A32. Contrary to petitioner's contention (Pet. 16), such proof would not require any inquiry into any protected, official act performed by any individual. Proof of the RICO enterprise therefore does not require any inquiry that would violate the Speech or Debate Clause.

4. Petitioner claims (Pet. 17-19) that the fact that he may choose to introduce evidence of legislative acts in his defense requires dismissal of the indictment.

Petitioner is mistaken, because nothing in the indictment requires him to introduce evidence of his legislative acts; the mere possibility that he may choose to do so does not require dismissal of the indictment. The court of appeals recognized that a Congressman may not be "*forced* to refute charges that directly implicate legitimate legislative acts." Pet. App. A28 n.14 (citing *Gravel*, 408 U.S. at 616). But this Court's holding in *Brewster* establishes that the Speech or Debate Clause does not require dismissal of an indictment because the defendant may choose to introduce evidence concerning legislative acts in his defense.

In *Brewster*, this Court approved a prosecution of a Senator for taking bribes in exchange for or because of the performance of a legislative act. As the dissent noted in that case, the indictment left the defendant with the obvious choice of defending himself by introducing evidence that he did not perform the legislative acts for which he was alleged to have received the bribe, or that he had legitimate reasons for supporting the legislation. See *Brewster*, 408 U.S. at 561 (White, J., dissenting). The Court nonetheless did not view that fact as barring the prosecution.

Petitioner is in precisely the same position as the defendant in *Brewster*: he may find it advantageous to introduce evidence of his legislative acts. The Speech or Debate Clause does not preclude him from doing so. But where proof of protected acts is not a necessary part of the government's burden, the introduction of such evidence by a Member seeking to establish a defense does not fall within the Clause's prohibition on his being "questioned" outside of Congress. Pet. App. A26-A28; see also *United States* v. *Myers*, 635 F.2d 932, 942 (2d Cir.), cert. denied, 449 U.S. 956 (1980). If it did, a defendant Member of Congress would be able to obtain complete immunity from prosecution by simply stating that he has decided to introduce evidence of official acts in his defense.

5. Finally, petitioner contends (Pet. 23-29) that the court of appeals erred in not requiring an elaborate pretrial procedure for prosecutions of Members of Congress, which would include a heightened pleading standard and a pretrial hearing to preview all of the government's evidence to determine, in advance of trial, whether its introduction would violate the Speech or Debate Clause.

The courts below correctly rejected petitioner's proposal. Under the collateral order doctrine, a defendant has a right to an interlocutory appeal from a district court's refusal to dismiss an indictment for violating the Speech or Debate Clause, in order to protect a Congressman's right under the Clause to avoid being questioned at all for acts done in either House. *Helstoski* v. *Meanor*, 442 U.S. 500, 506-508 (1979). An order refusing to dismiss an indictment on that ground satisfies the collateral order doctrine because (1) it represents a final rejection of the claim, (2) the Speech or Debate Clause issue is collateral to, and separable from, the principal issue at trial concerning the defendant's guilt or innocence, and (3) a Congressman would not enjoy the full protection of the Speech or Debate Clause if he could not avoid exposure to being questioned for acts done in either House on an indictment that clearly violated the Clause. *Ibid.*; Pet. App. A7-A8.

But this Court has never said that a Member of Congress, unlike any other criminal defendant, has a right to a pretrial ruling on every evidentiary question. That contention goes well beyond the collateral order doctrine and contravenes the principle that questions concerning the admissibility of evidence at a criminal trial are not separate from the merits of the case. Pet. App. A50; *DiBella* v. *United States*, 369 U.S. 121, 126-127, 131-132 (1962). Once the district court and the court of appeals have agreed that the charges are permissible under the Speech or Debate Clause, there remains no necessity for further interlocutory appellate review of issues in the case. Nothing in this Court's decision in *Helstoski* v. *Meanor* allowing an interlocutory appeal of "the District Court order denying dismissal of the indictment" on Speech or Debate Clause grounds, 442

U.S. at 508, suggested that a defendant is thereby entitled to a complete preview of the trial evidence and rulings on every evidentiary issue. See Pet. App. A88-A89 & n.7.

The court of appeals agreed that an indictment should be drawn with enough specificity regarding the nature of the charges that a motion for dismissal under the Speech or Debate Clause "can be adequately litigated and decided." Pet. App. A39. It also found that that requirement was satisfied in this case, where the indictment is "replete with factual details." *Ibid.* As both courts below recognized, petitioner is of course free to ask the district court to make further rulings before or during trial concerning specific evidence that might be inadmissible on Speech or Debate Clause grounds. *Id.* at A50, A88. But once it is determined that the prosecution is not entirely barred on Speech or Debate Clause grounds, it should be left up to the trial court, as in any other criminal case, to resolve evidentiary questions as they arise during trial.

The cases petitioner cites (Pet. 25 n.4) for the proposition that further detailed pretrial procedures should have been required do not support his argument. Rather, those cases stand for the same principle that controls the interlocutory appeal in this case: where a defendant claims the right to pretrial dismissal of a charge brought against him because forcing him to go to trial on that charge would violate the Double Jeopardy (or Speech or Debate) Clause, he is entitled to a pretrial ruling and an interlocutory appeal on the question of whether the charge must be dismissed. In that context, courts have tailored the procedures—including the allocation of the burden of proof—to the particular context in which the pretrial ruling must be made. See *United States* v. *Ragins*, 840 F.2d 1184, 1192 (4th Cir.

1988) (citing cases).[5] Courts addressing Speech or Debate Clause claims that charges must be dismissed may, where appropriate, similarly tailor their procedures as necessary to permit full and fair litigation of the issue. In this case, however, petitioner had a full and fair opportunity in both the district court and the court of appeals to litigate his claim that the Speech or Debate Clause prohibits some or all of the counts in the indictment brought against him. No further procedures are necessary to resolve that question.

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[5] Ordinarily, claims that a successive prosecution violates the Double Jeopardy Clause can be resolved on the basis of a comparison of the statutes under which the defendant was charged, without any evidentiary hearing or allocation of the burden of proof at all. See *United States* v. *Dixon*, 113 S. Ct. 2849, 2859-2864 (1993) (successive prosecutions under different statutes permitted only where each statute requires proof of an element not required by the other). Sometimes, however, a defendant is prosecuted more than once under the same or related conspiracy statutes, and the double jeopardy issue turns on whether the successive prosecutions are for the same conspiracy. All of the cases cited by petitioner (Pet. 25 n.4) concern that issue or the closely related issue that arises under the collateral estoppel doctrine. The resolution of that issue may turn in part on the facts that the government intends to prove at trial. Accordingly, a pretrial evidentiary hearing may be required. See, *e.g.*, *United States* v. *Loyd*, 743 F.2d 1555, 1562-1563 (11th Cir. 1984). At that stage of the proceedings, the government has within its control and knowledge the facts that it intends to prove at trial. The burden of proof on that issue, when it arises in the pretrial context, is therefore often placed on the government.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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